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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-

MULTI-STATE COMMUNICATIONS, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

The Court of Appeals affirmed the action of the respondent, Federal Communications Commission (the "Commission' or "FCC") which, under newly enacted Section 331 of the Communications Act, (1) reallocated television Channel 9 from New York to New Jersey and granted a five-year license to RKO General, Inc. (RKO) without a comparative hearing and (2) summarily dismissed as moot Multi-State's competing application for Channel 9 thus abruptly terminating without hearing its application pending since 1972, and vigorously pursued on all levels since that time. Affirmance was based on what the Court conceived to be its duty to read and apply the statute in conformity with what it believed to be its legislative intent although the terms of the statute were plain and unambiguous and a straightforward reading of it, in our view, did not authorize the reallocation of Channel 9 to New Jersey.

Further, the court below held that newly enacted Section 331 of the Communications Act made one limited exception to the comparative hearing requirement of Section 309 as mandated by this Court in *Ashbacker Radio Corp.* v. *FCC*, 326 U.S. 327, 66 S.Ct. 148, 90 L.Ed. 108 (1945), and, consequently, Multi-State's right initiated in 1972 to conclude normal hearing procedures required by *Ashbacker* was made moot.

The following questions are presented:

1. Whether the decision below by elevating perceived legislative intent over the plain, unambiguous terms of the statute constitutes judicial legislation and transcends the judicial function in conflict with controlling decisions of this Court.

2. Whether, contrary to the conclusion of the Court below, a competing applicant for a television channel which has filed and pursued its application under Section 309 of the Act for 12 years on all administrative and judicial levels has not thereby acquired a right to due process protection of the Fifth Amendment.

Succinctly, should new legislation, *or the interpretation thereof,* provide a safety net for the wrongdoer and thus seriously offend public policy? Should new legislation, *or the interpretation thereof,* be permitted to provide such a refuge and destroy the pre-existing and unrelated rights of another and thus seriously violate basic constitutional guarantees?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Multi-State Communications, Inc., petitions for a writ of certorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A)[1] is reported at 728 F.2d 1519. The decision and orders of the Commission are reported at 53 RR 2d 469 and 53 RR 2d 671 (1983). (App. B)

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[1]Citations to "App." refer to appendices to this Petition.

JURISDICTION

The judgment of the Court of Appeals was entered on March 6, 1984. A timely petition for rehearing and suggestion for rehearing en banc were denied on May 7, 1984. (App. C). The jurisdiction of the Court is invoked under 47 U.S.C. Sec. 402(j) and 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Constitution, statutory provisions and administrative regulations are set forth in Appendix D.

STATEMENT

Background

RKO General, Inc. (intervenor below and RKO hereinafter) is a wholly owned subsidiary of General Tire and Rubber Co. and for many years was the licensee of television Channel 9 in New York City (WOR-TV) as well as additional TV channels in Los Angeles (KHJ-TV) and Boston (WNAC-TV).

On May 1, 1972, Multi-State[2] filed a competing application for Channel 9 in New York contesting the license renewal application which had been filed by RKO.

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[2]Multi-State Communications, Inc., is a New York corporation comprised of some 55 citizens of New Jersey, New York and Connecticut. Since 1972, it has invested approximately one million dollars and thousands of hours of effort in support of its competing application for Channel 9 and has persisted in the pursuit of its application through round after round of administrative and judicial proceedings in the intervening years.

Thereafter there ensued a series of prolonged, complicated proceedings which are not necessary to detail for purposes of this petition. Eventually they led to the disqualification of RKO as a broadcast licensee in Boston, Los Angeles and New York. *RKO General, Inc.*, 78 FCC 2d 1-357, 47 RR 2d 921 (1980). The applications for the latter two stations had been conditioned by the FCC upon the outcome of the Boston renewal application.

The reasons for this decision centered upon RKO's anti-competitive reciprocal trade practices, the filing of false financial statements with the FCC and, importantly, the blatant lack of candor in dealings with the Commission by its parent General Tire as well as RKO.

On appeal, the Court of Appeals sustained the Commission's rejection of the Boston renewal application but remanded for a "principled explanation for RKO's disqualification as a licensee" of the Los Angeles and New York stations. *RKO General, Inc.* v. *FCC*, 670 F.2d 215 (D.C. Cir. 1981), *cert. den.*, 456 U.S. 927 (1982), holding, in effect, that the Commission could not automatically deny renewal in Los Angeles and New York because the reason for the conditioning of the latter two proceedings on the Boston proceeding did not comport with the ground on which the Court found RKO disqualified in the Boston proceeding.[3] Referring to the tangled web of misconduct and concealment by RKO and its parent, General Tire and

[3]"The FCC could not have known when it conditioned either of these proceedings as it did that the Boston outcome would turn on a lack of candor issue that had not even been designated in the Boston proceeding. RKO's misconduct did not occur directly before the trier of the fact in either the Los Angeles or New York City proceedings. Accordingly, these decisions must be remanded to the Commission for further consideration as it deems appropriate." 670 F.2d at 236.

Rubber Co.,[4] disclosed in the litigation as a "sorry chapter in the history of American communications law," the Court emphasized that its finding of egregious lack of candor" in the Boston proceeding is *res judicata* . . . and is not subject to collateral attack in these subsequent proceedings" and noted that "it may well be that such a finding is inconsistent with a licensee holding a license anywhere although that decision is for the Commission in the first instance." 670 F.2d at 237.

Despite the admonition of the Court of Appeals to expedite the remand proceeding – ("The need for a remand and further action by the Commission is discomforting in a fifteen year old case . . . We admonish all parties to get on with the task") the Commission failed to take further steps until the passage of legislation in 1982 which added new Section 331 to the Communications Act.

Tacked on the Tax Equity and Fiscal Responsibility Act of 1982 as an obvious non-germane amendment, the new Section 331 of the Communications Act of 1934,[5] entitled Very High Frequency Stations, was passed on August 19, 1982, and was signed into law on September 3, 1982. It reads as follows:

> "It shall be the policy of the Federal Communications Commission to allocate channels for

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[4]The Court, after noting that RKO is a wholly owned subsidiary of General Tire & Rubber Company and that the Commission has concluded tht the two companies were operated as a single integrated company, firmly states: "General Tire, by its own admission, has engaged in a staggering variety of corporate misconduct." 670 F.2d at 218.

[5]47 U.S.C. Sec. 331 (1982).

> very high frequency commercial television broadcaseting in a manner which insures that not less than one channel shall be allocated to each State, if technically feasible. In any case in which licensee of a very high frequency commercial television broadcast station notifies the Commission to the effect that such licensee will agree to the reallocation of its channel to a community within a State in which there is allocatd no very high frequency commercial television broadcast channel at the time of such notification, the Commission shall, notwithstanding any other provision of law, order such reallocation and issue a license to such licensee for that purpose pursuant to such notification for a term of not to exceed 5 years as provided in section 307(d) of the Communications Act of 1934."

Because the proposed new Section 331 of the Communications Act of 1934 was introduced as a last minute "rider" to the Tax Equity and Fiscal Responsibility Act of 1982, it escaped the processing through the normal legislative channels which customarily is required for such a substantive amendment to a major federal statute. Consequently, scrutiny and reasoned consideration by the appropriate Committees having expertise in federal communications matters was avoided. There were neither hearings nor floor discussion or debate on this unusual amendment. Perfunctory statements of its sponsor, Senator Bradley, and a relatively cursory reference to it in the report of the Conference Committee on the Tax Equity and Fiscal Responsibility Act of 1982 are all that can be mustered as scanty legislative history.

A very high frequency commercial television broadcast channel (Channel 13) had been allocated to the State of New Jersey for many years and was so designated in the

Commission's Table of Assignments[6] at the time of enactment of the statute, *supra*.

In 1961, the Commission approved the transfer of the license of Channel 13 from NTA Television Corporation to Educational Television for the Metropolitan Area (ETMA) and authorized the location of its main studio in New York City[7] on condition that fully adequate studio facilities be maintained at Newark, New Jersey, at all times. ETMA proposed the use of this commercial channel essentially for non-commercial educational purposes.[8]

The channel was never reallocated as stressed by the Commission in its Order (44 FCC 2563, at 2567, 2573) and from that day to the present, it has remained a commercial VHF channel allocated to Newark, New Jersey.

Four days following the enactment of Section 331, on September 7, 1982, RKO notified the Commission that it agreed to the terms of Section 331 and stated that it would relocate its main studio to Secaucus, New Jersey,[9] upon issuance of a license for a term of five years. However, its transmitter would remain atop the World Trade Center in New York. Thus, RKO proposed to use the identical trans-

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[6]For years the table of television allocations were technically denominated "Table of Assignments" 47 C.F.R. Sec. 73606; Sixth Report and Order, 41 FCC 148 (1952) (Television Assignments). More current reference is Table of Television Channel Allotments, 83 FCC 2d 51 n.1 (1980). Hence, the terms "Assignments"and "Allotments" are synonymous and so understood in the trade and Commission practice. (See App. D.)

[7]*NTA Television Broadcasting Corp.*, 44 FCC 2563 (1961).

[8]"There is no requirement that a commercial channel be employed soley for commercial purposes." *NTA Television Broadcasting Corp., supra*, at 2564.

[9]Secaucus is a community of approximately 13,000. The FCC Mass Media Bureau had recommended any such reallocation of Channel 9 should be to Newark, the principal city of New Jersey.

mitter site it used as a New York station and to broadcast to the identical area it served for many years as a New York licensee. In essence, its proposed transmutation from a New York station to a New Jersey station is obviously a cosmetic one wholly designed to overcome the adverse findings of Commission and Court as to RKO's qualifications to continue as a broadcast licensee.

Wthout further hearings, the Commission subsequently granted RKO's "request" for reallocation of Channel 9 to Secaucus and granted a license for a term of five years by Order adopted December 8, 1982, and released March 11, 1983 (App. B, p. 19a).

By separate Order adopted December 8, 1982, and released March 29, 1983 (App. B, p. 39a), the Commission dismissed as moot the competing application of Multi-State which was then pending for hearing in accordance with the remand order of the Court of Appeals.

The Commission held that its actions in granting the reallocation of Channel 9 to Secaucus and its dismissal of the ten-year-old competing application of Multi-State were mandated by new Section 331 of the Communications Act of 1934.

However, three of the members of the Commission expressed serious concern as to the constitutional validity of the abrupt termination of Multi-State's comparative hearing rights (App. B, pp. 31a-34a)

While "reluctantnly acced(ing)" to RKO's move and relicensing and to the termination of Multi-State's comparative hearing rights, Commissioners Fogarty and Rivera candidly noted "We are nonetheless deeply troubled by the prospect that our actions here violate Multi-State's due process rights. The essential question, it seems to us, is

whether extinguishing the WOR-TV comparative renewal proceeding impermissibly deprives Multi-State of its Section 309 comparative hearing rights and, thus, of due process of law." (App. B, p. 34a).

Commissioner Anne P. Jones in a separate statement (App. B, p. 30a), expressed doubt as to the action of the Commission in dismissing as moot the competing application of Multi-State, referring to the Commission's order as ". . . very problematical insofar as it moots Multi-State's competing application. . . ."

The Court of Appeals, on March 6, 1984, affirmed the orders of the Commission. 728 F.2d 1519 (D.C. Cir. 1984). In substance, the Court below held that it was necessary to resort to legislative history to understand the purpose of Section 331 (although its terms were plain and unambiguous) and that its intent was to furnish an "operating" VHF commercial television station to New Jersey notwithstanding the fact that a VHF commercial channel already was allocated to it. Further, the Court below concluded that Multi-State had no constitutional protection against the divestment of its license application without a hearing.

REASONS FOR GRANTING THE WRIT

The grant of certiorari is warranted because of the importance of the question of federal statutory construction and the length to which agencies or courts may depart from the clear and unambiguous terms of a statute to effect what is believed to be the intent of the legislature.

Moreover, and importantly, a significant issue of administrative law is posed by the summary dismissal without further legal process of Multi-State's competing appli-

cation for Channel 9 which has been pursued since 1972 at substantial expense. Such action contravenes the ordinary due process requirements laid down in *Ashbacker Radio Corp.* v. *FCC,* 326 U.S. 327, 66 S.Ct. 148 (1945). This Court has referred to such full hearing requirements as "essential for wise and just application of the authority of administrative boards and agencies." *United States* v. *Storer Broadcasting Co.,* 351 U.S. 192, 202, 76 S.Ct. 763, 767 (1956). Such hearing rights are "rights of substance." *Kessler* v. *FCC,* 326 F.2d 673 (D.C. Cir. 1963).

Because of the premier role assigned to the District of Columbia Circuit in the review of FCC decisions, this case warrants the exercise of the over-view or supervisory authority of this Court in preserving the integrity of the administrative process.

I. THE DECISION BELOW REPRESENTS JUDICIAL LEGISLATION AND CONTRAVENES DECISIONS OF THIS COURT AND OTHER FEDERAL COURTS.

The plain, unequivocal language of the statute seeks to provide for reallocation of a VHF channel "to a community within a *State in which there is allocated no very high frequency commercial television broadcast channel"* under a policy "which ensures that not less than one such channel shall be allocated to each State."

The action of the Commission in reallocating Channel 9 from New York City to Secaucus, New Jersey, in reliance upon the provisions of Section 331 was clearly at variance with the statute's plain language since a "very high frequency commercial television broadcast channel" had already been allocated to New Jersey and was plainly carried as such in the television allocation table of the Commission's rules. C.F.R. Sec. 73.606(b). The Commission con-

ceded this fact stating, in pertinent part, in ft. n. 2, of its Report and Order (App. B, p. 21a)

"An examination of the television allocation table (73.606(b) of the Commission's rules) shows that Channel 13, a non-reserved[10] *VHF television channel is allocated to New Jersey."* (Emphasis ours).

In a labored effort to qualify this key admission and to cover its deviation from the express terms of new Section 331, the Commission noted that Channel 13 has been used for a non-commercial purpose and that "RKO's application would represent the first provision of commercial VHF television to New Jersey and would conform to the explicit Congressional intent to facilitate such service to the State of New Jersey. That is not what is stated in new Section 331 either explicitly or implicitly.

What the Commission – and the Court below – has totally ignored is the statute's plain statement of policy for FCC guidance which speaks only to the *allocation* of VHF commercial television channels and is expressive of nothing else. A statutory statement of policy, of course, is declarative of legislative intent and is a most reliable indicator of the legislative mind.

It can not be questioned that the fact that Channel 13 was engaged in non-commercial programming did not affect its status as a *commercial* station, as conceded by the Commission in this case.[11] Importantly, the statute is ad-

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[10]Non-reserved means "commercial."

[11]More than thirty years ago, in *Lufkin Amusement Company,* 8 RR 666 (1952), the Commission emphasized that:

> "The unreserved (commercial) channels may be used commercially as the licensee sees fit." (p. 668). See also, *NTA Television Broadcasting Corp.,* 44 FCC 2563 (1961).

dressed not to the *initiation* of a first commercial VHF service but plainly and exclusively to *allocation* of Very High Frequency television stations. The declared policy which is sought to be imposed upon the Commission is "to allocate channels for very high frequency commercial television broadcasting in a manner which ensures that not less than one such channel shall be allocated to each State, if technically feasible.

Reallocation of such a channel can only be made "to a community within a State *in which there is allocated no very high frequency commercial television broadcast channel. . . .*" (Emphasis ours).

The lawful justifiction for reallocation is readily apparent on the face of the statute itself; reallocation can only be made to a community in a State which has no very high frquency commercial television broadcast channel allocated to it.

Obviously, therefore, the reallocation of Channel 9 to Secaucus, New Jersey, is patently at odds with the plain, non-complicated terms of Section 331. For this apparent reason, the Commission was constrained to resort to a construction of the statute's intent — a construction designed to support and justify its mistaken action.

The Commission's unjustified action has been condoned and erronesouly approved by the Court of Appeals.

The grant of RKO's request for reallocating Channel 9 from New York to New Jersey led the Commission to conclude that, as a consequence of such reallocation, the competing application of Multi-State was moot. Hence, in a separate order, adopted December 8, 1982, and released March 28, 1983 (App. B, p. 39a), the Commission dismissed as moot the competing application for Channel 9 which

Multi-State had filed on May 1, 1972, and which it had vigorously pursued ever since.

The Commission's summary dismissal of Multi-State's competing application for Channel 9 without further legal process has likewise been erroneously affirmed by the Court of Appeals.

The conduct of Commission and Court in resorting to a construction of legislative intent in order to overcome the full force and effect of the plain language of the statute itself is a departure from governing norms of statutory construction, since resort to legislative history is not justified when a statute is clear and unequivocal on its face. *United States* v. *Oregon,* 366, U.S. 643, 81 S.Ct. 1278 (1961); *Tennessee Valley Authority* v. *Hill,* 437 U.S. 153, 98 S.Ct. 2279, 57 L.Ed. 117 (1978); *Rubin* v. *U.S.,* 449 U.S. 424, 101 S.Ct. 698, 66 L.Ed. 2d 633 (1981); *Howe* v. *Smith,* 452 U.S. 473, 101 S.Ct. 2468, 69 L.Ed. 2d 171 (1981).

As one court has put it: "Ordinarily, where the language of a statute is clear and unambiguous on its face, the thrust of the language should not be controverted by seeking to show an inconsistent legislative intent." *Sea- Land Service, Inc.* v. *Federal Maritime Commission,* 404 F.2d 824 at 828 (D.C. Cir. 1968).

In *Packard Motor Car Co.* v. *National Labor Relations Board,* 330 U.S. 485, 67 S.Ct. 789, 91 L.Ed. 1040 (1947), the court cogently underscored that: "It is for Congress not for us to create exceptions or qualifications at odds with its [the Act] plain terms." 67 S.Ct. at 792.

There is no confusion or ambiguity between the terms "allocated" or "assigned" as posited by the Court below as giving rise to a need for resorting to lengthy legislative

history (728 F.2d 1522-1524).[12] Certainly, the Commission entertained no doubt that Channel 13, a commercial VHF television channel was *"allocated* to New Jersey" at the very time the statute was enacted as clearly set forth in footnote 2 of its Report and Order. (app. B, p. 21a). The statute, it will be noted, speaks to *allocations* of a VHF television channel and not to its use for either a commercial or non-commercial purpose. Yet, both Commission and Court resorted to a construction of the statute so as to import within its terms a requirement that "an *operating* VHF commercial television station" was mandated. In this manner, the statute was elarged – its terms varied. Thus, the clear and precise test for determining whether *reallocation* conformed with its terms was substantially changed.

The statutory test, whether the State to which the licensee seeks reallocation is one "in which there is allocated no very high frequency commercial television broadcast channel" is transformed by adding the qualifying term "operating" so as to modify and radically alter the statutory test.

There can be no serious question that a straightforward reading of Section 331 simply does not permit the reallocation of Channel 9 to New Jersey – a State to which a very high frequency commercial television broadcast channel was already allocated as candidly conceded by the Commission.

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[12]"We are . . . bound by the words employed and are not at liberty to conjure up conditions to raise doubts in order that resort may be had to construction. It is elementary that, where no ambiguity exists, there is no room for construction. Inconvenience of hardships, if any, that result from following the statute as written must be relieved by legislation . . . *Construction may not be substituted for legislation." United States* v. *Missouri Pac. R.R. Co.*, 278 U.S. 269, 278, 49 S.Ct. 133, 136 (1929). (Underscoring ours).

Rewrite of a statute is not the province of a Court or an administrative body irrespective of what they may conceive to be its legislative intent. *Iselin* v. *United States,* 270 U.S. 245, 46 S.Ct. 248 (1926). There, Justice Brandeis, writing for the Court, in unqualified terms, stated:

> "What the government asks is not a construction of statute but, in effect, an enlargement of it by the Court, so that what was omitted, presumably by inadvertence, may be included within its scope. *To supply omissions transcends the judicial function.*" 270 U.S. at 251, 46 S.Ct. at 250. (Emphasis supplied).

As Justice Frankfurter once reflected wisely: "An omission at the time of enactment, whether careless or calculated, cannot be judicially supplied, however much later wisdom may recommend the inclusion." *Frankfurter, Some Reflections on the Reading of Statutes,* 47 Col. L. Rev. 527, 534 (1943).

The point is not whether a statute differently worded would result in better executing legislative intent since, as Mr. Justice Cardozo (for the Court) put it in *Anderson* v. *Wilson,* 289 U.S. 20, 53 S.Ct. 417 (1933): "We take the statute as we find it." *Id.* at 27.

As Mr. Justice Holmes once noted: "We do not inquire what the legislature meant; we ask only what the statute means." *Holmes, Collected Legal Papers,* 207.

In the very earliest days of Supreme Court history, Chief Justice Marshall, in *United States* v. *Wiltberger,* 5 Wheat (18 U.S.) 76, 95-96, 5 L.Ed. 37 (1820) wrote:

> "The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction."

The danger in resorting to legislative history when, as here, a statute is not "inescapably ambiguous," is touched upon forcefully by Mr. Justice Jackson in a concurring opinion in *United States* v. *Public Utility Comm. of California,* 345 U.S. 295, 73 S.Ct. 706 (1953), wherein it is suggested that in certain circumstances such a process leads not to an "interpretation of a statute but creation of a statute." *Id.* at 719-720. A comparable view was expressed by Chief Justice Vinson in *Ex Parte Collett,* 337 U.S. 55, 69 S.Ct. 944 (1949).

We need not emphasize that remarks of legislators or reports of committees, however instructive or interesting, are not governing law. Only the statute itself is enacted by the Congress and signed by the President and hence becomes a binding law.

The rule of *Iselin, supra,* has found general and continued application by this Court and lower Courts.

United States v. *Missouri Pac. R.R. Co.,* 278 U.S. 269, 49 S.Ct. 133, 73 L.Ed. 322 (1929); *Hanover Bank* v. *C.I.R.,* 369 U.S. 672, 82 S.Ct. 1080, 8 L.Ed. 2d 187 (1962); *Wallace* v. *Cutten,* 298 U.S. 229, 56 S.Ct. 753, 80 L.Ed. 157 (1936); *Toilet Goods Assoc.* v. *Fnch,* 419 F.2d 21 (2d Cir. 1969); *Manufacturers Hanover Trust Co.* v. *C.I.R.,* 431 F.2d 664 (2d Cir. 1970); *American Standard, Inc.* v. *Crane Co.,* 510 F.2d 1043 (2d Cir. 1974); *Tracy Leigh Dev. Corp.* v. *Government of Virgin Islands,* 501 F.2d 439 (3rd Cir. 1974); *Busey* v. *Deshler Hotel Co.,* 130 F.2d 187 (6th Cir. 1942); *United States* v. *W.T. Rawleigh Co.,* 267 F.2d 180 (7th Cir. 1959); *Bosse* v. *C.I.R.,* 479 F.2d 1147 (7th Cir. 1973); *Fisher Flouring Mills Company* v. *United States,* 270 F.2d 27 (9th Cir. 1959); *Heater* v. *F.T.C.,* 503 F.2d 321 (9th Cir. 1974); *In Re Shear,* 139 F.Supp. 217 (D.C.N.D. Cal. 1956); *United States* v. *One*

Ford Sedan, 164 F.Supp. 729 (D.C. Md. 1958); *Associated Telephone & Tel. Co.* v. *United States,* 199 F.Supp. 452 (D.C.S.D. N.Y. 1961); *National Petroleum Refiners Assoc.* v. *F.T.C.,* 340 F.Supp. 1343 (D.C.D.C. 1972).

As the Court below, in another case, so definitively expressed the governing canon here involved: ". . . although a court should interpret the meaning of statutory language in light of the intent of its drafters, we cannot rewrite the statute to compensate for unforseen circumstances. That power belongs to the legislature alone." *Joseph* v. *U.S. Civil Service Commission,* 554 F.2d 1140 at 1155. (D.C. Cir. 1977).

It would appear self evident that the Court below has trespassed beyond the limits of statutory interpretation and has engaged in enlargement of the statute to accommodate what it perceived to be the intent of the statute's putative author. This, in our view, is a serious departure from the governing rule of law, and, if left unchecked, will constitute a misleading precedent particularly in the field of administrative law.

The relevant issue is not whether the construction placed upon the statute by the Court below better accords with the intent of its author. Rather, the question is whether the reading which the agency and the Court has favored is that which the Congress "effectuated by its enactment of [the] statute." *Badaracco* v. *C.I.R.,* ____ U.S. ____, 104 S.Ct. 756 (1984). In that case, this Court has recently reaffirmed:

> "Court's are not authorized to rewrite a statute becaues they might deem its effects susceptible of improvement." (Citing *T.V.A.* v. *Hill,* 437 U.S. 153, 194-195, 98 S.Ct. 2279, 2301-2302, 57 L.Ed.2d 117 (1978)).

II. THE DECISION BELOW IMPERMISSIBLY DENIES THE PROTECTION OF THE DUE PROCESS REQUIREMENT OF THE FIFTH AMENDMENT TO MULTI-STATE BY AFFIRMING THE COMMISSION'S SUMMARY DISMISSAL OF ITS SECTION 309 APPLICATION WHICH HAD BEEN PURSUED FOR MORE THAN A DECADE.

Due Process

Section 309 of the Communications Act (47 U.S.C. Sec. 309) as construed in this Court's landmark decision in *Ashbacker Radio Corp.* v. *FCC,* 326 U.S. 327, 66 S.Ct. 148, 90 L.Ed. 108 (1945), mandates a full comparative hearing in every case involving mutually exclusive applicants for a broadcasting license.

Moreover, in license renewal cases, "the FCC is required to make an affirmative finding that the public interest will be served by granting the license." *West Coast Media, Inc.* v. *FCC,* 695 F.2d 617 at 622 (D.C. Cir. 1982).

In the opinion of the court below, however, both of these fundamental and historical requirements of the Act are made "moot" in the limited context of recently added Section 331 (728 F.2d at 1525). Although Section 331, on its face, does not purport to amend Section 309 of the Act, the Court of Appeals seemingly found that it served to overcome the comparative hearing requirement in connection with this one case.

It is imperative, therefore, that the destructive impact of Section 331 upon the long-pending application of Multi-State be examined in constitutional terms. A central issue is whether a Section 309 television application litigated and pursued for more than a decade has evolved into a

species of property entitled to the due process protection of the Fifth Amendment.[13]

The right to a hearing on an application which presents a valid basis, as here, and which has been vigorously pressed for more than a decade is a species of property entitled to constitutional recognition and protection.[14] It cannot be denied that Multi-State has expended substantial resources in pursuing its Channel 9 application. This fact must not be ignored and certainly enters into any fair appraisal of its case.

It is fair to say that Multi-State's antecedent right to a full and fair hearing in completion of that which began in 1972 has every indicia of a protected property interest. Although originally derived from Section 309 of the Act, that right fully exercised over a period of many years thereby became rooted in the Constitution. This right merits due process protection as much as welfare benefits. (*Goldberg* v. *Kelly,* 397 U.S. 254 90 S.Ct. 1101 (1970), a horse trainer's license (*Barry* v. *Barchi,* 443 U.S. 55, 99 S.Ct. 2642 (1979)), a high school education (*Goss* v. *Lopez,* 419 U.S. 565, 95 S.Ct. 729 (1975)), a cause of ac-

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[13]For example, the Commissionn recognized that a competing application achieves a value so that incumbent licensees are permitted to settle out the competing claim with Commission approval. Prior to 1982, compensation was limited to expenses incurred by the withdrawing applicant. The Commission approved payment of almost three quarters of a million dollars by an incumbent to a withdrawing challenger in *Hampton Roads Television Corp.,* 46 RR 2d 1547 (1980).

[14]The Commission, as early as 1943, alluded to Section 309 as granting an absolute hearing right. *Hearing on S.814, Senate Committee on Interstate Commerce,* 78th Cong. 1st Sess. 942 (1943). Cf, *United States* v. *Storer Bdc. Co.,* 351 U.S. 192 (1956). We do not suggest, of course, that an evidentiary hearing is required when no valid purpose can be served thereby.

tion (*Mullane* v. *Central Hanover Bank,* 339 U.S. 306, 70 S.Ct. 652 (1950)), or the use of a state's Fair Employment Practices Commission's adjudicatory procedures (*Logan* v. *Zimmerman Brush Co.,* 455 U.S. 422, 102 S.Ct. 1148 (1982).

Given Multi-State's pursuit of its application in the renewal proceeding which was pressed at substantial expense for more than a decade and which spanned all levels of administrative and judicial processes, it is evident that the full hearing right conferred by Section 309 of the Act ripened into a species of property entitled to the *full protection* of the Due Process Clause of the Constitution. In this respect it may properly be said in the words of a current, well-known television ad – "They earned it." *Logan* v. *Zimmerman Brush Co., supra; Mullane* v. *Central Hanover Bank & Trust Co., supra.*

The right to due process "is conferred, not by legislative grace but by constitutional guarantee. While the legislature may elect not to confer a property interest . . . it may not constitutionally authorize the deprivation of such an interest once conferred, without appropriate procedural safeguards. As our cases have consistently recognized, the adequacy of statutory procedures for deprivation of a statutorily created property interest must be analyzed in constitutional terms." *Arnett* v. *Kennedy,* 416 U.S. 134, 164-167, 94 S.Ct. 1633, 1650-1651 (1974), per Powell, Jr. See also, *Vitek* v. *Jones,* 455 U.S. 480, 100 S.Ct. 1254 (1980).

The power of Congress to alter or carefully limit rights conferred by statute, in certain circumstances is to be recognized. But the total destruction or elimination of such a right without due process as was accomplished in this case, does not fall within the ambit of such author-

ities.[15] As noted in *Logan, supra,* the government "may not finally destroy a property interest without first giving the putative owner an opportunity to present his claim of entitlement." 455 U.S. at 434, 102 S.Ct. at 1157.

The Court of Appeals holds erroneously that the statutory phrase "notwithstanding any other provision of law" disposes of this material issue. There is, however, no sound authority to support the conclusion that such verbiage can cancel the due process protections attending an antecedent right which is grounded in the Constitution of the United States, such as that of Multi-State. The Constitution of the United States cannot be abrogated in such a fashion.

Additionally, the court below erred in approving the retroactive application of Section 331 so as to moot Multi-State's long litigated application. This was a matter of serious concern to Commissioners Fogarty and Rivera, as we have earlier noted.

It is fundamental that a statute, to be construed retrospectively, must clearly provide for and permit retrospective application by its own terms. *Union Pacific R. Co.* v. *Laramie Stock Yards Co.,* 231 U.S. 190, 34 S.Ct. 101, 58 L.Ed. 179; *Greene* v. *United States,* 376 U.S. 149, 84 S.Ct. 615, 11 L.Ed. 2d 516 (1964). Importantly, a clear intendment of retrospective application must be plainly in-

[15]The decision below, concludes, without persuasive authority that Congress by Section 331 made moot the hearing procedures construed in *Ashbacker.* 728 F.2d at 1525. Section 331, of course, does not deal at all with this critical question. Such an unexpressed purpose cannot be inferred lightly. *Parker* v. *Brown,* 317 U.S. 341, 63 S.Ct. 307 878 L.Ed. 315 (1943). There is not a scintilla of evidence to indicate that any legislative thought whatever was given to the application of Multi-State's long pending for hearing for Channel 9.

dicated within the legislative enactment — particularly where, as here, an antecedent right of substance would be harshly and oppressively affected.

It will be noted that the operative language of Section 331 makes no mention of the pending application of Multi-State or the existence of the comparative renewal case. It contains no authorization or suggestion of retroactive application to the pending renewal case. Indeed, as we have noted, *supra,* there is no indication that Congress gave any legislative thought to the pendency of Multi-State's application and the intended effect of the proposed statute upon it.

To condone this patent deprivation of due process, as the Court below has done, is plain error. *Lynch* v. *United States,* 292 U.S. 571, 54 S.Ct. 840, 78 L.Ed. 1434 (1934). The unfair result produced by retroactive application in these circumstances should not be tolerated.

Equal Protection

Equal protection considerations attend the analysis of the treatment of Multi-State's case by the Court of Appeals when viewed in constitutional terms. "While the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process.' " *Schneider* v. *Rusk,* 377 U.S. 497, 74 S.Ct. 693 (1954).

The Court of Appeals totally ignored the equal protection principle of the Fifth Amendment implicated in its holding that: "The enactment of Section 331, however, altered the statutory scheme discussed in *Ashbacker.* In Section 331 Congress makes one limited exception to the comparative hearing requirement. . . ." 728 F.2d at 1525. If this stated conclusion of the Court of Appeals is correct

then it is evident that the statute, Section 331, was designed not only to save RKO General from the loss of Channel 9 but also to target and destroy the only viable challenger for the Channel and the potential owner, thereof, namely, Multi-State. Such, in our view, is discrimination per se "so unjustifiable as to be violative of due process." *Schneider* v. *Rusk, supra. Yick Wo* v. *Hopkins,* 118 U.S. 356, 6 S.Ct. 1064 (1886). The statute adversely affects no other person and, hence, is constitutionally offensive, in its application.

CONCLUSION

The incorrect interpretation by the Commission and the Court below of the new Section 331 provides a safety net for a wrongdoer and deprives another of basic constitutional guarantees. For these reasons the reuqested writ of certiorari should be granted.

Respectfully submitted,

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August 6, 1984

APPENDIX A

OPINION U.S. COURT OF APPEALS DISTRICT OF COLUMBIA CIRCUIT

Multi-State Communications, Inc.,
Appellant,

v.

Federal Communications Commission,
Appellee.

Nos. 83-1296 & 83-1325

March 6, 1984

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 83-1296 & 83-1325

MULTI-STATE COMMUNICATIONS, INC., APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE

RKO GENERAL, INC., INTERVENOR

Appeals from Orders of the
Federal Communications Commission

Argued December 7, 1983

Decided March 6, 1984

Joseph M. Morrissey, with whom *Edward P. Morgan*, *Charles A. McNelis*, *Kevin T. Maroney*, and *Robert T. Murphy* were on the brief, for appellant.

Daniel M. Armstrong, Associate General Counsel, Federal Communications Commission, with whom *Bruce E. Fein*, General Counsel, and *Sue Ann Preskill*, Counsel, Federal Communications Commission, were on the brief, for appellee. *L. Andrew Tollin*, Attorney, Federal Communications Commission, also entered an appearance for appellee.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

J. Roger Wollenberg, with whom *Joel Rosenbloom*, *Thomas F. Connell*, *Bruce D. Ryan*, *Harold David Cohen*, *William H. Fitz*, *Jack N. Goodman*, and *Kevin R. Barry* were on the brief, for intervenor RKO General, Inc.

Before WRIGHT and TAMM, *Circuit Judges*, and LUTHER M. SWYGERT,* *Senior Circuit Judge* for the Seventh Circuit.

Opinion for the court filed by *Circuit Judge* TAMM.

TAMM, *Circuit Judge*: Appellant, Multi-State Communications, Inc. (Multi-State), challenges two orders of the Federal Communications Commission (Commission). The first order reallocated television Channel 9 from New York to New Jersey and granted, without a comparative hearing, a five-year license to operate Channel 9 to Intervenor RKO General, Inc. (RKO). 53 Rad. Reg. 2d (P & F) 469 (1983). The second order dismissed as moot Multi-State's competing application for a license to operate Channel 9. 53 Rad. Reg. 2d (P & F) 671 (1983). Multi-State contends that these orders misconstrued section 331 of the Communications Act of 1934, 47 U.S.C.A. § 331 (West Supp. 1983), and violated Multi-State's constitutional rights. For reasons expressed below, we affirm the Commission's orders.

I. BACKGROUND

In 1972, RKO filed an application to renew its license to operate WOR-TV, a commercial television station on very high frequency (VHF) Channel 9 in New York City.[1] Shortly thereafter, Multi-State challenged RKO's renewal request by filing a competing application to operate Channel 9. Because the competing applications were mutually exclusive, the Commission ordered a

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* Sitting by designation pursuant to Title 28 U.S.C. § 294(d) (1976).

[1] RKO has been the licensee of VHF Channel 9 in New York City since 1952.

comparative hearing to determine which applicant was better qualified to be licensee of the New York station. *RKO General, Inc. (WOR-AV)*, 46 F.C.C.2d 246 (1974).

At the comparative hearing, the Commission indicated that it would examine six financial and character qualification issues. 46 F.C.C.2d at 250. Three of these issues were identical to issues already under consideration in another proceeding involving an application by RKO to renew its license to operate a Boston television station. *Id.* at 248-49. To avoid duplication, the Commission stated that its findings on the three common issues under consideration in the Boston proceeding would be res judicata on RKO's renewal request for the Channel 9 license. *Id.* at 249.

In the Boston proceeding, the Commission found that RKO lacked the requisite character qualifications for renewal of its Boston license. *RKO General, Inc. (WNAC-TV)*, 78 F.C.C.2d 1 (1980), *aff'd*, 670 F.2d 215 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 927 (1982). Because this finding was res judicata on RKO's renewal request for the Channel 9 license, the Commission denied renewal of RKO's license for Channel 9 in New York. *RKO General, Inc. (WOR-TV)*, 78 F.C.C.2d 357, 358 (1980). On December 4, 1981, this court reversed and remanded the Commission's decision regarding the Channel 9 license on the ground that the Commission had not provided a "principled explanation" for disqualifying RKO as the licensee of Channel 9.[2] *RKO General, Inc. v. FCC*, 670 F.2d 215, 237 (D.C. Cir. 1981), *cert. denied*, 457 U.S. 1119 (1982).

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[2] Specifically, this court stated that "[e]ach of RKO's renewal applications arises in different contexts and presents different levels of complexity. . . . [WOR-TV in New York is] entitled to an opportunity to appear directly before the Commission and to argue that [it] deserve[s] different treatment than RKO's Boston station." 670 F.2d at 237.

During the course of these administrative and judicial proceedings, Congressmen from New Jersey introduced legislation to secure a commercial VHF television station for their state. These efforts included a bill proposed in July 1982 by Senator Bradley of New Jersey that would require the Commission to issue a license to any existing licensee that volunteered to move to an unserved state.[3] Senator Bradley's bill became law on September 3, 1982, and stated:

> It shall be the policy of the Federal Communications Commission to allocate channels for very high frequency commercial television broadcasting in a manner which ensures that not less than one such channel shall be allocated to each State, if technically feasible. In any case in which [a] licensee of a very high frequency commercial television broadcast station notifies the Commission to the effect that such licensee will agree to the reallocation of its channel to a community within a State in which there is allocated no very high frequency commercial television broadcast channel at the time [of] such notification, the Commission shall, notwithstanding any other provision of law, order such reallocation and issue a license to such licensee for that purpose pursuant to such notification for a term of not to exceed 5 years as provided in Section 307(d) of the Communications Act of 1934.

47 U.S.C.A. § 331 [hereinafter cited as section 331].

On September 7, 1982, while its license renewal application was still pending, RKO notified the Commission that it agreed, pursuant to section 331, "to the reallocation of Channel 9 from New York, New York, to Secaucus, New Jersey, upon issuance by the Commission to RKO of a regular license . . . having a term of five

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[3] Senator Bradley's bill was appended as section 355 to the Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324 (1982).

years." Joint Appendix (J.A.) at 62. The Commission determined that a reallocation pursuant to section 331 should not be followed by a comparative hearing proceeding:

> [Section 331] specifically says that, upon notification by a licensee of its agreement to reallocate its channel to an unserved State, "the Commission shall, *notwithstanding any other provision of law*, order such reallocation and issue a license to such licensee" for a term of up to five years. The emphasized language, in our view, includes those statutory and regulatory provisions pertaining to comparative proceedings.

53 Rad. Reg. 2d at 471, J.A. at 3. Accordingly, the Commission ordered the reallocation and granted RKO a five-year license. 53 Rad. Reg. 2d (P & F) 469 (1983), J.A. at 1. In a companion order, the Commission dismissed as moot Multi-State's competing application for the Channel 9 license. 53 Rad. Reg. 2d (P & F) 671 (1983), J.A. at 19.

This appeal followed, in which Multi-State contends that the Commission's orders misconstrued section 331 and violated Multi-State's constitutional rights.

II. Analysis

A. *The Application of Section 331 to New Jersey*

Multi-State first argues that the Commission erred in reallocating Channel 9 to New Jersey because section 331 is, by its express terms, not applicable to New Jersey. Section 331 applies only to situations where an existing licensee volunteers to move its channel to "a State in which there is *allocated* no [VHF] commercial broadcast channel . . . ." 47 U.S.C.A. § 331 (emphasis added). Multi-State contends that the term "allocated" is synonymous with the term "assigned." In 1952, the Commission assigned Channel 13 to Newark, New Jersey, as a VHF

commercial station. *Television Assignments—Sixth Report and Order*, 41 F.C.C. 148, 258-59 (1952).[4] Because Channel 13 continues to be assigned to New Jersey in the Commission's Table of Assignments, 47 C.F.R. § 73.606 (b) (1982), Multi-State argues that New Jersey plainly is outside the scope of section 331.

At first glance, Multi-State's construction of "allocated" has some appeal. Construing a statutory term, however, requires more than a superficial and isolated examination of the statute's plain words. Ascertaining congressional intent requires us to examine "the context in which statutory words are set—the statute's purpose, structure, and history . . . ." *Natural Resources Defense Council, Inc. v. EPA*, No. 81-2001, slip op. at 15 (D.C. Cir. Jan. 17, 1984). *See also FBI v. Abramson*, 456 U.S. 615, 625 & n.7 (1982). Our understanding of the purpose of section 331 and our examination of its legislative history compel us to reject Multi-State's construction of the term "allocated."

We first observe that although New Jersey was assigned Channel 13 in 1952, the Commission in 1961 approved the transfer of that channel's license from a commercial operator in New Jersey to a noncommercial operator in New York. *NTA Television Broadcasting Corp.*, 44 F.C.C. 2563 (1961). Since 1961, Channel 13 has been operated as part of the New York state educational network. 53 Rad. Reg. 2d at 470 n.2, J.A. at 2 n.2. Thus, prior to the enactment of section 331, New Jersey had been without an operating VHF commercial television station for more than twenty years. The absence of such a station resulted in dissatisfied television viewers in New Jersey due to incomplete coverage of local events. *See, e.g., Petition for Inquiry Into the Need for Adequate*

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[4] Television channels are assigned to communities in rulemaking proceedings, resulting in a Table of Assignments found at 47 C.F.R. § 73.606(b) (1982).

Television Service for the State of New Jersey, 58 F.C.C. 2d 790 (1976); *Second Report and Order*, 59 F.C.C.2d 1386 (1976); *Third Report and Order*, 62 F.C.C.2d 604 (1976).

Consequently, New Jersey Congressmen introduced legislation in an effort to secure a VHF station for their state.[5] On March 31, 1982, Senator Bradley of New Jersey introduced a bill that was identical in language to section 331.[6] 128 Cong. Rec. S3160 (daily ed. Mar. 31, 1982). When introducing this bill, Senator Bradley emphasized New Jersey's need for a VHF commercial television station.[7] *Id.* He said that this bill would solve New Jersey's problem because it

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[5] S. 1629, Sen. Amendment No. 868, 97th Cong., 2d Sess. (1982) (Sen. Bradley, D-N.J.); H.R. 4961, Sen. Amendment No. 1124, 97th Cong., 2d Sess. (1982) (Sen. Bradley, D-N.J.); H.R. 2128, 97th Cong., 1st Sess. (1981) (Rep. Guarini, D-N.J.); S. 1377, Amendment No. 202, 97th Cong., 1st Sess. (1981) (Sen. Bradley, D-N.J.); H.R. 7311, 96th Cong., 2d Sess. (1980) (Rep. Maguire, D-N.J.); H.R. 11,936, 95th Cong., 2d Sess. (1978) (Rep. Maguire, D-N.J.); S. 2853, 95th Cong., 2d Sess. (1978) (Sen. Case, R-N.J. & Sen. Williams, D-N.J.).

[6] Significantly, RKO earlier had announced its willingness to move from New York to New Jersey if it were issued a new license for VHF Channel 9. Reply Comments of RKO, BC Docket No. 80-719 at 2 (July 20, 1981), J.A. at 50. Senator Bradley was aware of RKO's announcement when he introduced his bill. 127 CONG. REC. S11,136 (daily ed. Oct. 6, 1981).

[7] Senator Bradley said:

> On several occasions, I have stood on this floor to explain . . . how important this issue is to the people of my State. Unfortunately, half of the State learns about New Jersey primarily from the perspective of New York and the other half of the State sees New Jersey from the eyes of Philadelphia.

128 CONG. REC. S3160 (daily ed. Mar. 31, 1982).

> directed [the Commission] to accept and grant the application of any current license holder who voluntarily requests to have its commercial VHF TV license moved to a State which does not have one.... It is my hope that with the barriers to a voluntary resolution to New Jersey's problem removed, a New York station owner will step forward to move to New Jersey.

Id. Although the Senate adopted Senator Bradley's bill, it was appended to another bill that did not become law.

Senator Bradley therefore introduced the same bill again on July 22, 1982. 128 Cong. Rec. S8922 (daily ed. July 22, 1982). The Bradley bill again passed the Senate and this time was added to the Tax Equity and Fiscal Responsibility Act of 1982. This bill, with the Bradley amendment, was referred to a House-Senate conference committee.[8] The conference committee retained the Bradley amendment and reported on the amendment as follows:

> New Jersey and Delaware are the only two States that do not have a commercial VHF television station. The [Bradley] amendment affirms the congressional intent that it is in the public interest for every State to have at least one VHF television station. In order to implement that intent, the amendment provides that, upon notice by any licensee in another State that it agrees to the reallocation of its channel to a community in a State in which there is no such channel, the Federal Communications Commission shall order the reallocation and issue a license to the licensee for such purpose.

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[8] On August 5, 1982, eight Congressmen wrote a letter to each member of the conference committee urging retention of the Bradley amendment. The letters stated that the effect of the amendment "is that WOR-TV in New York will be able to move to New Jersey and have its license reallocated there." Letter of Congressman John F. Seiberling, *et al.*, to Congressman John Dingell, Chairman, House Energy and Commerce Committee (Aug. 5, 1982), J.A. at 86.

> This provision will remove impediments which currently discourage a licensee in a State which has more than one VHF television station from voluntarily moving to a State which has none. It is the intention of Congress that any current licensee which exercises the option of seeking the transfer of its license to an unserved State . . . will . . . operate for the public benefit of the unserved State.

H.R. Rep. No. 760, 97th Cong., 2d Sess. 690 (1982); S. Rep. No. 530, 97th Cong., 2d Sess. 690 (1982). The conference report was adopted by both Houses on August 19, 1982,[9] and Senator Bradley's bill became law on September 3, 1982.

The frequent references to New Jersey make it clear that the sponsor and proponents of section 331 intended New Jersey to be within the statute's scope. More importantly, the conference report illustrates beyond cavil that Congress intended section 331 to apply to New Jersey. The conferees expressly noted that "New Jersey and Delaware are the only two States that do not have a commercial VHF television station. [Section 331 affirms and implements] the congressional intent . . . for every State to have at least one [such] station." H.R. Rep. No. 760, 97th Cong., 2d Sess. 690 (1982); S. Rep.

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[9] On the eve of the Senate's consideration of the conference report, Senator Bradley continued to emphasize that enactment of his bill would result in a VHF commercial television station for New Jersey:

> With the enactment of tonight's legislation, New Jersey will no longer be one of only two States in the country which has no VHF commercial television station. . . . One station has already expressed a desire to move to New Jersey. . . . [T]he reallocation of a license to New Jersey will mean that the licenseholder will move its studios and offices to New Jersey and operate in New Jersey for the benefit of the people in our State. . . . This station will not be a New Jersey station in name only. It will serve the people of New Jersey.

128 CONG. REC. S10,946 (Aug. 19, 1982), J.A. at 99.

No. 530, 97th Cong., 2d Sess. 690 (1982). The conferees thus clearly contemplated New Jersey as being within the ambit of section 331 notwithstanding that New Jersey already was assigned a VHF commercial channel. The conference report, viewed against the backdrop of five years of legislative efforts by New Jersey Congressmen to secure a VHF station for their state, reveals that the purpose of section 331 is to provide each "unserved" state with an *operating* VHF commercial television station. *Id.* Accordingly, we must reject Multi-State's invitation to construe "allocated" synonymously with "assigned," because such a construction would ignore congressional intent and thwart the legislative will. *See Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975).

B. *The Commission's Grant of the License to RKO*

Multi-State next argues that RKO is not a "licensee" within the meaning of section 331 in light of the Commission's earlier disqualification of RKO as the licensee of Channel 9. *See* 78 F.C.C.2d 357 (1980). Contrary to Multi-State's assertion, we find that RKO's earlier disqualification did not destroy its status as a licensee. When RKO volunteered to move from New York to New Jersey pursuant to section 331, RKO was the licensee of Channel 9. Although RKO's application for renewal of its license was before the Commission on remand from this court, *RKO General, Inc. v. FCC*, 670 F.2d 215 (D.C. Cir. 1981), *cert. denied*, 457 U.S. 1119 (1982), RKO's status as a licensee during the pendency of the renewal proceeding was unaltered. *See* 5 U.S.C. § 558(c) (1982) (when a licensee applies for renewal, the license will not expire until the application has been finally determined by the agency); 47 U.S.C. § 307(d) (Supp. V 1981) (pending a final decision on a license renewal application, the Commission shall continue such license in effect).

Multi-State also contends that the Communications Act of 1934, 47 U.S.C. § 307 (1976 & Supp. V 1981),

mandates that the Commission conduct a comparative hearing to determine which of two or more competing license applicants would better serve the public interest. Multi-State therefore argues that the Commission erred in not conducting a comparative hearing for RKO and Multi-State with respect to Channel 9. We find no error in the Commission's decision to proceed without the comparative hearing. The plain language of section 331 commands that if any licensee volunteers to move to an unserved state, "the Commission *shall*, notwithstanding any other provision of law, *order such reallocation and issue a license* . . . ." 47 U.S.C.A. § 331 (emphasis added). *See Boyden v. Commissioner of Patents*, 441 F.2d 1041, 1043 n.3 (D.C. Cir.) ("'[s]hall' is the language of command"), *cert. denied*, 404 U.S. 842 (1971). The Commission thus complied with the plain language of the statute.

Furthermore, the phrase, "notwithstanding any other provision of law" overrides any prior, inconsistent provision of the Communications Act. *See New Jersey Air National Guard v. FLRA*, 677 F.2d 276, 283 (3d Cir.), *cert. denied*, 103 S. Ct. 343 (1982). *See also Devine v. White*, 697 F.2d 421, 429 (D.C. Cir. 1983); *Bryant v. Civiletti*, 663 F.2d 286, 292 (D.C. Cir. 1981). Through its use of the phrase, "notwithstanding any other provision of law," Congress expressly made inapplicable all provisions of law that would prevent or impede the voluntary movement of a VHF commercial station to an unserved state. This conclusion is buttressed by the conference committee report, which says that section 331 was designed to "remove impediments which currently discourage a licensee in a State which has more than one VHF television station from voluntarily moving to a State which has none." H.R. Rep. No. 760, 97th Cong., 2d Sess. 690 (1982); S. Rep. No. 530, 97th Cong., 2d Sess. 690 (1982). Section 331 thus displaced the normal procedures for channel reallocation as well as the normal

procedures for issuing licenses, including the requirement of a comparative hearing.[10]

C. *The Alleged Constitutional Violation*

Finally, Multi-State argues that its constitutional right to due process was violated when the Commission applied section 331 to deprive Multi-State of its vested right to a comparative hearing. Multi-State contends that it acquired a vested right to a hearing pursuant to the Supreme Court's decision in *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945). In *Ashbacker*, the Supreme Court, in construing section 309(a) of the Communications Act,[11] held that "where two *bona fide* [license] applications are mutually exclusive the grant of one without a hearing to both deprives the loser of the opportunity

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[10] We also reject Multi-State's contention that the Commission's "cut-off" rules entitle Multi-State to a comparative hearing. The Commission's "cut-off" rules protect timely-filed license applicants from competition with late-filed applicants. *See* Bronco Broadcasting Co., 58 F.C.C.2d 909, 910-11 (1976). In this case, the Commission acted pursuant to section 331 to eliminate the availability of Channel 9 in New York to *any* applicant. The applications of RKO and Multi-State for the deleted New York channel became moot, and the Commission properly dismissed them both on this ground. 53 Rad. Reg. 2d (P & F) 671 (1983), J.A. at 19. Thus, the "cut-off" rules became inapplicable.

[11] Section 309(a) of the Communications Act provides:

> Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 of this title applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

47 U.S.C. § 309(a) (1976).

which Congress chose to give him." 326 U.S. at 333. Multi-State contends that the Commission committed constitutional error in interpreting section 331 so as to divest Multi-State of its right to a hearing pursuant to *Ashbacker*.

Contrary to Multi-State's assertion, the decision in *Ashbacker* does not confer upon Multi-State a constitutional right to a hearing. The right to a hearing in *Ashbacker* stemmed from a statutory scheme in the Communications Act that ordinarily precludes denial of a license application without a hearing. The enactment of section 331, however, altered the statutory scheme discussed in *Ashbacker*. In section 331, Congress made one limited exception to the comparative hearing requirement to achieve the overriding objective of bringing an operational VHF commercial television station to unserved states such as New Jersey and Delaware. Thus, in the limited context of section 331, Congress made moot the hearing procedures construed in *Ashbacker*.

Congress, of course, has paramount power in the regulatory field. *See F.H.A. v. Darlington, Inc.*, 358 U.S. 84, 91 n.6 (1958). We find section 331 to be permissible regulation of future action: it directs the Commission, under specified and limited circumstances, to reallocate a VHF channel and issue a license for that channel.[12] As the Supreme Court said in *Darlington*:

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[12] Congress acted within its lawful powers under the commerce clause in enacting section 331. The due process clause does not bar the exercise of those powers. *See, e.g.*, Flemming v. Nestor, 363 U.S. 603, 611-12 (1960); Motor and Equipment Mfrs. Ass'n, Inc. v. EPA, 627 F.2d 1095, 1127 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 952 (1980). *See also* Daylo v. Administrator of Veterans' Affairs, 501 F.2d 811, 816 (D.C. Cir. 1974) (quoting McCullough v. Virginia, 172 U.S. 102, 123-24 (1898)) ("[l]egislation may act on subsequent proceedings, [and] may abate actions pending").

We note that licensees of broadcasting stations acquire no prescriptive right against the subsequent exercise of con-

> Federal regulation of future action based upon rights previously acquired by the person regulated is not prohibited by the Constitution. So long as the Constitution authorizes the subsequently enacted legislation, the fact that its provisions limit or interfere with previously acquired rights does not condemn it.

358 U.S. at 91 (quoting *Fleming v. Rhodes*, 331 U.S. 100, 107 (1947)).

We recognize that the Commission's action pursuant to section 331 terminates abruptly, albeit temporarily,[13] Multi-State's pursuit of a license for Channel 9. Nevertheless, Congress elevated the goal of providing unserved states with an operational VHF commercial television station. The Commission merely effected congressional intent. The fact that the Commission's action frustrated Multi-State's expectations is no basis for finding that the Commission committed constitutional error. *See Motor and Equipment Mfrs. Ass'n v. EPA*, 627 F.2d 1095, 1128 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 952 (1980).

III. Conclusion

In construing section 331, our duty is to find that interpretation which most fairly can be said to effect the legislative will. *See Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 608 (1979). Our interpretation of

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gressional power under the commerce clause to delete their station to achieve fair geographical distribution of broadcast service. Federal Radio Comm'n v. Nelson Brothers Bond and Mtge. Co., 289 U.S. 266, 282 (1933). *A fortiori*, the mere expectations of a license applicant cannot bar the legitimate exercise of such congressional power. As the Supreme Court has advised: "Those who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end." *Darlington*, 358 U.S. at 91.

[13] Multi-State may, of course, apply for a license for Channel 9 in New Jersey at the expiration of RKO's license.

section 331 coincides with that of the Commission. Although we sympathize with the situation in which Multi-State finds itself as a result of the Commission's orders, we find that the actions taken by the Commission were mandated by Congress. Accordingly, the Commission's orders are

Affirmed.

APPENDIX B

A. *Channel 9 Reallocation,* 53 RR 2d 469 (1983)

B. *RKO General, Inc. (WOR-TV),* 53 RR 2d 671 (1983)

CHANNEL 9 REALLOCATION (WOR-TV)

FCC 82-558
32956
48 FR 11711

In the Matter of	)	
	)	
Petition to Reallocate VHF Television Channel 9 from New York, New York, to a City Within the City Grade Contour of Station WOR-TV	)	BC Docket No. 80-719 RM-3682

Adopted: December 8, 1982
Released: March 11, 1983

[¶10:331, ¶53:24, ¶53:606] *Reallocation of VHF channel to New Jersey.*

Acting pursuant to the requirements of Section 331 of the Act, the Commission grants a New York City commercial television licensee's request that its channel be reallocated to Secaucus, New Jersey, and grants the licensee's license application for a term of five years. It is expected that the licensee will devote itself to meeting the special needs of its new community (and the needs of the Northern New Jersey area in general). Applications opposing the licensee's renewal and seeking permits to operate on its channel at New York are dismissed as moot; further, the existence of a commercial television station located in Northern New Jersey can be expected to have a significant effect upon the special obligations previously imposed upon New York City stations when those stations' licenses come up for review. Channel 9 Reallocation (WOR-TV), 53 RR 2d 469 [1983].

REPORT AND ORDER
(Proceeding Terminated)

By the Commission: Commissioners Fogarty and Rivera concurring in part and dissenting in part and issuing a joint statement at a later date; Commissioner Jones concurring in part and dissenting in part and issuing a statement; Commissioner Dawson concurring and issuing a statement.

1. In 1980 the Commission adopted a Notice of Proposed Rule Making, 84 FCC 2d 180 (1980), proposing to reassign Channel 9 from New York City to a community in Northern New Jersey with the present city grade contour of Station WOR-TV (Channel 9). On August 19, 1982, while this rule making proceeding was pending, Congress passed the Tax Equity and Fiscal Responsibility Act of 1982, which added Section 331 to the Communications Act of 1934, as amended (hereinafter Section 331).[1] This new section re-

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[1]The new Section 331 provides:

"It shall be the policy of the Federal Communications Commission to allocate channels for very high frequency commercial television broadcasting in a manner which ensures that not less than one such channel shall be allocated to each State, if technically feasible. In any case in which a licensee of a very high frequency commercial television broadcast station notifies the Commission to the effect that such licensee will agree to the reallocation of its channel to a community within a State in which there is allocated no very high frequency commercial television broadcast channel at the time of such notification, the Commission shall, notwithstanding any other provision of law, order such reallocation and issue a license to such licensee

quires the Commission to reallocate a VHF commercial television station to a community within a state that does not have such a station, upon notification from a licensee that it agrees to the relocation. Specifically, Section 331 directs that when a licensee notifies the Commission of its agreement to reallocation "to a community . . . the Commission shall, notwithstanding any other provision of law, order *such* reallocation. . . ." (Emphasis added.) Thus, the Commission's discretion in this matter, including determining the community of license, is limited by the express wording of the statute.

2. In response to this legislation, RKO has notified the Commission by letter dated September 7, 1982, that it agrees to the requirements of Section 331. In this regard, RKO states that it will relocate its main studio to Secaucus, New Jersey, upon issuance by the Commission of a license for a term of five years. It indicates that its transmitter will remain atop the World Trade Center in New York City. On the basis of this notification, we find that RKO satisfies the terms of Section 331,[2] and that we

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for that purpose pursuant to such notification for a term of not to exceed 5 years as provided in Section 307(d) of the Communications Act of 1934."

[2]An examination of the television allocation table (§73.606(b) of the Commission's rules) shows that Channel 13, a non-reserved VHF television channel, is allocated to New Jersey. However, this channel has been used for more than twenty years by educational broadcasting Station WNET-TV for a *noncommercial* purpose as part of the New York state educational facilities network. Thus, RKO's application would represent the first provision of commercial VHF television service to New Jersey and would conform to the explicit Congressional intent to facilitate such service to the State of New Jersey. See 128 Cong. Rec. S10946 (daily ed. Aug. 19, 1982) (remarks of Sen. Bradley); 128 Cong. Rec. H6347 (daily ed. August 17, 1982) 128 Cong. Rec. S8923 (daily ed. July 22, 1982), and S. Rep. No. 97-530, 97th Cong., 2nd Sess. 690 (1982).

are now in a position to grant a first commercial VHF station to New Jersey by reallocating Channel 9 to Secaucus, New Jersey.[3] Moreover, in light of the passage of Section 331 and our action today in conformity with the statute we will terminate our rule making proceeding.[4]

3. In reassigning Channel 9 to serve New Jersey, we have not followed traditional assignment criteria developed pursuant to Section 307(b) of the Communications Act of 1934, as amended. In this regard, we have not undertaken an evaluation of communities eligible for licensing and their comparative needs for a local television station. Rather, we are guided strictly by what we perceive to be the intent of the legislation to license a station to "operate for the public benefit of the unserved state." S. Rep. No. 530, 97th Cong. 2d Sess.690 (1982). As the sponsor of the amendment stated:

> "[T]he reallocation of a license to New Jersey will mean that the license-holder will move its studios and offices to New Jersey and operate in New Jersey *for the benefit of the people in our State* . . . I intend to carefully monitor the development of any New Jersey station to insure that *it is responsive to the needs of my State. This station*

[3]Although the Commission previously denied renewal of RKO's license, RKO General, Inc. (WOR-TV), 78 FCC 2d 357 (1980), that decision has been remanded to the Commission by the U.S. Court of Appeals, RKO General, Inc. v. FCC, 670 F2d 215 [50 RR 2d 821] (DC Cir. 1981), cert. denied, ____ US ____, 102 S Ct 2931 (1982), and no action on the remand has been taken. Thus RKO's present status as a licensee qualifies it under Sections 307(d) and 331 of the Communications Act and Section 558(c) of the Administrative Procedure Act.

[4]Further compliance with the rule making procedures of the Administrative Procedure Act (e.g. further notices of proposed rule making etc.) is unncessary in light of the explicit direction from Congress in Section 331, to reallocate the channel upon notification by a licensee who qualifies under the statute.

will not be a New Jersey station in name only. It will serve the people of New Jersey."

128 Cong. Rec. 10946 (daily edition) August 3, 1982 (remarks of Senator Bradley) (emphasis added).

4. Thus we believe it would be appropriate to take steps toward carrying out this intention through a higher service responsibility within RKO's Grade B coverage area. We come to this conclusion regarding RKO's service based not only on the Congressional intent but also from RKO's statements pertaining to its own programming intentions. In its October 13, 1982 letter to the Commission, RKO stated ". . . RKO believes that as New Jersey's only VHF television station it will be desirable to orient the station's news and other informational programming to the entire region of New Jersey, which it will serve," indeed, RKO states that its specification of Secaucus as the city of license would allow it to devote more time to the needs of its entire New Jersey coverage area since the needs of Secaucus could be readily satisfied. In contrast, RKO suggests that the local needs of a much larger city, such as Newark, would require more time to satisfy, at the expense of the needs of the rest of its northern New Jersey service area.

5. Considering RKO's statements with regard to its programming expectations in conjunction with the clear Congressional intent, we anticipate that RKO's continued use of VHF Channel 9 will be directed toward satisfying the programming needs of its New Jersey Grade B coverage area. In the usual case, Secaucus, the city of assignment, would be the primary focus of the licensee's programming responsibilities. However, we have previously determined that the lack of local VHF television service to this highly populated area of northern New Jersey presented a unique

set of circumstances. See e.g., Docket 20350 2nd R&O, 59 FCC 2d 1386 [37 RR 2d 1275] (1976), wherein special service obligations have been imposed on all New York City and Philadelphia TV stations. Accordingly, we expect RKO to perform a higher degree of service to its Grade B coverage area than is normally required of a broadcast licensee. At renewal time RKO will be judged by how it has met the obligation to serve the greater service needs of Northern New Jersey, which we view as broader than the specific needs of Secaucus.

6. We have recognized that our action here moots the competing application of Multi-State Communications Inc. for the Channel 9 frequency (Docket Nos. 19991-19992). Multi-State's mutually exclusive application was pending when Section 331 was enacted. After a careful examination of both the terms and the legislative history of Section 331, however, we are convinced that Congress did not intend that any reallocation be followed by comparative hearing proceedings, including completion of proceedings which commenced prior to the passage of Section 331. The statute specifically says that, upon notification by a licensee of its agreement to reallocate its channel to an unserved State, "the Commission shall, *notwithstanding any other provison of law,* order such reallocation and issue a license to such licensee" for a term of up to five years. The emphasized language, in our view, includes those statutory and regulatory provisions pertaining to comparative proceedings.

7. Moreover, the legislative history of Section 331 indicates an explicit Congressional intent to facilitate commercial VHF television service to the State of New Jersey. See n. 2, supra. The Conference Report explaining Section 331 states:

> "It is the intention of Congress that any current licensee which exercises the option of seeking the transfer of its license to an unserved state under the terms of this section will move its studio and offices, *to and operate for the public benefit of the unserved State.*"

S. Rep. No. 530, supra, at 690 (emphasis added).

8. At the same time Section 331 does not give the Commission the power to force an unwilling licensee to move to New Jersey. Instead Congress here contemplated that a reallocation would occur only as a result of a licensee's voluntary notification of its agreement to such reallocation. RKO is the only licensee to come forward since the enactment of Section 331 and voluntarily agree to the reallocation of its channel to an unserved State. There is nothing in the record here to indicate, however, that RKO would be willing to undertake a reallocation to New Jersey if the pending comparative proceeding in which it was involved were to continue. Indeed, in its notification to the Commission pursuant to the statute, RKO stated that "it agrees to the reallocation of Channel 9 from New York, New York to Secaucus, New Jersey, *upon issuance by the Commission to RKO of a regular license for that purpose having a term of five years.*" (Emphasis added.) RKO recently stated its understanding that its notification pursuant to Section 331 would terminate the comparative proceeding:

> "Thus, Section 331 and RKO's acceptance of the reallocation of WOR-TV requires that the previous proceedings on Multi-State's application for Channel 9 in New York and RKO's renewal application for WOR-TV, New York, come to an end. When WOR-TV has moved to New Jersey, Channel 9 will no longer be available in New York. Consequently, by operation of the statute,

> the proceedings before the Commission concerning RKO's and Multi-State's applications for that channel will become moot when the Commission complies with the statute and issues a license to RKO for the reallocated Channel 9."

Letter to Chairman Mark S. Fowler, September 15, 1982.

9. It is also apparent that Congress was aware that Section 331 might apply, inter alia, to RKO,[5] and that the statute would affect competing applicants. In particular, Chairman Fowler wrote to Congressman John Dingell, Chairman of the House Energy and Commerce Committee on July 27, 1982, concerning an earlier version of the statute, S. 1629. In that letter Chairman Fowler stated that under the provisions of the proposed legislation:

> "[t]he Commission would be required to grant the renewal application of the VHF licensee in question without considering other public interest factors long used in making such a decision. . . . [C]ompeting applications for the licensee's facilities would be dismissed without comparison of the qualifications of the new applicant(s) vis-à-vis those of the incumbent licensee."

Multi-State itself raised those concerns during Congressional consideration of the earlier version of Section 331.

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[5]For example, in discussing the bill that was ultimately adopted, Senator Bradley stated: "It is my hope that an application will shortly be made. One station has already expressed a desire to move to New Jersey." 97 Cong. Rec. S10946 (daily ed. August 19, 1982). In addition, Congressman John F. Seiberling and seven other members of the House noted: "What this means is that WOR-TV in New York will be able to move to New Jersey and have its license reallocated there." Letter to Congressman John Dingell, Chairman, House Energy and Commerce Committee, August 5, 1982.

In letters sent to 22 Senators and Congressmen on May 19, 1982, Multi-State stated:

> "[Multi-State's] 'protected status' is well established by FCC regulations and recognized by the Commission in all its proceedings. The Bradley amendment [to S. 1629] disregards this recognized right of Multi-State and will totally destroy the longstanding equity of our protected position. . . . [The] amendment . . . destroys the recognized standing of one party."

10. Under these circumstances, we view the statute as a Congressional determination of the rights of competing applicants.[6] Accordingly, as discussed above, we have concluded that RKO's notification is sufficient to bring Section 331 into play and we have issued RKO the license it requests pursuant to that notification. We believe that these actions are compelled by the statute and Congressional intent, notwithstanding the adverse effects on Multi-State.

11. One issue raised in the Notice of Proposed Rule Making should be addressed at this time, i.e., the special service obligations now imposed upon New York and Philadelphia stations to provide better coverage to the needs of

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[6]The Commission's allocation and licensing functions are derived directly from the authority of Congress to regulate radio communications pursuant to its power to regulate interstate commerce. In delegating its authority, Congress sets forth the standards by which that authority will be exercised. FCC v. Pottsville Broadcasting Co., 309 US 134 (1940); Federal Radio Comm'n v. Nelson Brothers Bond & Mortgage Co., 289 US 266 (1933).

New Jersey residents.[7] When this obligation was imposed it was announced that a review of each station's performance would take place in connection with each station's renewal application. The period for renewing New York television stations is June 1, 1984, while the licenses for Pennsylvania television stations expire on August 1, 1984. The Notice announced that we did not intend to abandon this requirement. Rather the obligations imposed under the previous Commission order would continue to be scrutinized. We believe that a review of the performance of each stations' service obligations to New Jersey should take place as scheduled in connection with the renewals of these station licenses to determine the benefits occasioned by this program and the need to continue or eliminate the subject obligation. However, we note that the existence of a commercial VHF station located in northern New Jersey and licensed to serve the needs of this area may have a significant impact on the necessity to continue the special service obligations imposed upon the New York stations when they come up for review.

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[7]In connection with the rule making proceeding we have pending two "Motions to Strike." The first was submitted by Multi-State Communications, Inc. directed to a study attached to the comments of Andrew Maguire. The second motion relates to supplemental comments of RKO General, Inc. that pertain to the then pending-legislation (Section 331) and the appeal of the RKO case before the Court of Appeals. The subsequent enactment of Section 331 renders both of these matters moot.

Similarly, we have before us the request of Wm. J. Pascrell, Jr., Director of Policy Planning and Management, Paterson, New Jersey, to reopen the comment period in view of the enactment of Section 331, or in the alternative, to consider additional data regarding the needs of Paterson for the reassignment of Channel 9. As stated in the text, our discretion in this matter is limited by the express wording of the statute. Accordingly, the request will be denied.

12. Accordingly, it is ordered, that effective April 20, 1983, §73.606(b) of the Commission's rules, the Television Table of Assignments is amended for the following communities:

	Channel No.	*City*
Secaucus, New Jersey	9+	
New York, New York	2, 4, 5+, 7, 11+, *25, 31-	

13. Canadian concurrence in this action has been obtained.

14. Authority for the adoption of the amendments herein is contained in Sections 4(i), 303(r) and 331 of the Communications Act of 1934, as amended.

15. It is further ordered, that pursuant to Section 331 of the Communications Act of 1934, as amended, RKO General, Inc., the licensee of Station WOR-TV, Secaucus, New Jersey is hereby granted a license for a term of 5 years from the effective date of this action.[8]

16. It is further ordered, that this proceeding is terminated.

STATEMENT OF COMMISSIONER ANNE P. JONES
CONCURRING IN PART AND DISSENTING IN PART

I concur in the basic decision to reallocate Channel 9 to New Jersey because I agree that under existing circumstances such reallocation is, in effect, mandated by new Section 331 of the Communications Act. Although I find this action very problematical insofar as it moots Multi-

[8]RKO will be expected to file a renewal application at the end of its term that would specify a period extending to June 1, 1989, in order to make its license term consistent with the expiration date of all New Jersey television licenses.

State's competing application, I believe the Commission must bow in this matter to the apparent will of Congress.

I do not, however, agree with the majority that we need or should approve RKO's selection of Secaucus as its new community of license or issue this license for a 5-year term. On the first point, I believe it would make more sense, and better comport with the Act as a whole, to assign this channel to Newark, the largest city in New Jersey, rather than to the much smaller Secaucus. On the second point, I believe that limiting the term of this license to June 1, 1984, would serve two good purposes: it would conform the term of this license to those of all other New Jersey television licenses and also would provide an early opportunity for Multi-State to renew its bid for this license if it chooses to do so. On these points, therefore, I respectfully dissent.

CONCURRING STATEMENT OF
COMMISSIONER MIMI WEYFORTH DAWSON

I agree that Congress has left the Commission little discretion regarding the reallocation of Channel 9 to Secaucus, New Jersey, and the termination of the comparative renewal hearing involving WOR-TV.

However, I am concerned about the amorphous nature of the standard by which the Commission will judge WOR-TV's performance. In the decision the Commission indicates that it will hold WOR-TV accountable to a "higher service responsibility within RKO's Grade B coverage area." Sl. op. at 4. Even if the Commission wishes to impose such a "higher" service standard, I fear that our remarkable lack of clarity leaves the Commission with a virtually incomprehensible standard by which to measure WOR-TV. For example, does this standard mean that WOR-TV must produce some specific program or program series which deals with each of the cities within

WOR-TV's Grade B contour? Does it require the existence of new facilities or personnel in each of these cities? Such a protean criterion merely invites confusion and leaves the Commission even less able to judge WOR-TV's performance than it is to judge other licensees at renewal.

Finally, it seems obvious that the FCC's lack of clarity invites protracted litigation at WOR-TV's next renewal concerning the parameters of "higher service responsibility."

In short, I am afraid that the Commission's vague standard will ultimately create more problems for the Commission that it will solve, and, accordingly, I concur in the Commission's judgment.

JOINT STATEMENT OF COMMISSIONERS HENRY M. RIVERA AND JOSEPH R. FOGARTY CONCURRING IN PART, DISSENTING IN PART

Recognizing that the reallocation of Channel 9 to the State of New Jersey and the issuance of a license to RKO General to operate on that channel raise difficult legal questions, we nonetheless concur in these actions because they appear mandated by the Congress.[1] We dissent, however,

[1]See infra note 3 and accompanying text. In this regard, we are especially sensitive to Congress' sharp criticism of this Commission for its failure to heed the plain language of the lottery provision added to Section 309 of the Communications Act by the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 357 (1981). In reenacting successor legislation retaining the principles of original Section 309(i), the Conferees stated:

> "The Conferees considered [the FCC's failure to adhere to Congress' directive] to be in clear violation of the plain language of the statute, which mandated that the Commission prescribe lottery rules within 180 days, while permitting the agency discretion only with respect to when a lottery would actually be used. It was felt that as a creature of Congress, the Commission must obey the directives of its creator, and that it is not for the FCC to presume legislative intent when Congress clearly mandated that an ac-

from the issuance of a five-year license to this licensee, and from the majority's refusal to override RKO's selection of Secaucus as its community for license; these acts are not statutorily mandated and in our judgment they undermine congressional purpose.

Our decisions here abruptly inter a comparative renewal proceeding between RKO General and Multi-State Communications, Inc., which has continued for over a decade and has spanned all levels of the administrative and judicial processes. Despite the rights enjoyed by Multi-State under Ashbacker Radio Corp. v. FCC,[2] and despite the substantial resources Multi-State has expended in perfecting and pursuing its application for Channel 9, newly-enacted Section 331 of the Communications Act is evidently designed to arrest the pending comparative case if RKO agrees to move to New Jersey. [We do observe that the conclusion that RKO may utilize Section 331 in this circumstance and with this effect is not crystal clear on the face of the statute, but seems obvious as a matter of statutory construction.[3]] For this reason, we reluctantly ac-

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> tion be taken, or to refuse to take action because it felt that Congress had not passed the precise lottery statute it wanted."

Conference Report on Communications Act Amendments of 1982, H. Rep. No. 97-765, 97th Cong., 2d Sess. 23-24 (1982).

[2]326 US 327 (1945).

[3]The operative language of Section 331, which makes no direct mention of New Jersey, RKO, or pending comparative renewal cases, states:

> "In any case in which a licensee of a very high frequency commercial television broadcast station notifies the Commission to the effect that such licensee will agree to the reallocation of its channel to a community within a State in which there is allocated no very high frequency commercial television broadcast channel at the time of such notification, the Commission shall, notwithstanding any other provision of law, order such reallocation and issue a

cede to RKO's move and relicensing and to the termination of Multi-State's comparative hearing rights. Our reluctance stems from our concern that this termination of Multi-State's comparative hearing rights may be constitutionally invalid; however, recognize that constitutional review of federal statutes is ordinarily for the judiciary,

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license to such licensee for that purpose pursuant to such notification for a term not to exceed 5 years as provided in Section 307(d) of the Communications Act of 1934."

Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324, 641 (1982). Section 331's command that a license be granted to any licensee who notifies the Commission of its intent to relocate at the time of such notification notwithstanding any other provison of law, literally taken, leaves the Commission no choice but to disregard Multi-State's existing Section 309 comparative hearing rights. If the pending comparative renewal case were somehow continued, the identity of the licensee for the disputed channel would remain open to question until the conclusion of the hearing, a scenario inconsistent with the statutory directive that the FCC issue a license to any licensee upon receiving the specified notification. Nor does Section 331 appear to contemplate the grant of a "conditional" license or other abnormal authorization that would permit both the issuance of a license to RKO and continuation of the Multi-State proceeding. Furthermore, as RKO General chronicles at length in its September 15, 1982 letter to Chairman Fowler, it seems plain from Section 331's legislative history that Senator Bradley, Section 331's chief architect and sponsor, and other key members of Congress, including the Conferees on the tax legislation with which Section 331 was enacted, contemplated that RKO could be a beneficiary of the legislation notwithstanding the pendency of the WOR-TV proceeding. See Letter to Congressman John Dingell from Congressman John Seiberling, dated August 5, 1982; 128 Cong. Rec. S10946 (Aug. 19, 1982) (remarks of Senator Bradley on Section 395 of the 1982 tax bill); 128 Cong. Rec. S3160 (March 31, 1982) (remarks of Senator Bradley on S. 1629, the predecessor to Section 331); 127 Cong. Rec. S11136 (Oct. 6, 1981) (same). See also Conference Report on the Tax Equity and Fiscal Responsibility Act of 1982, S. Rep. No. 530, 97th Cong., 2d Sess. 690 (1982).

not this agency[4] which, as an arm of Congress, must implement congressional directives.[5]

Having concluded that Congress intended the Commission to issue RKO an unconditional license to serve New Jersey upon the requisite notification, we nevertheless strongly disagree with the majority's view that Section 331 binds the Commission to grant that license for a five-year term and to accept the particular city specified by RKO as Channel 9's community of license. Moreover, as a matter of policy, the majority's action on these issues is inconsistent with the legislative purpose of Section 331 and

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[4]See Califano v. Sanders, 420 US 99, 109 (1977).

[5]We are nonetheless deeply troubled by the prospect that our actions here violate Multi-State's due process rights. The essential question, it seems to us, is whether extinguishing the WOR-TV comparative renewal proceeding impermissibly deprives Multi-State of its Section 309 comparative hearing rights and, thus, of due process of law. See generally United States Trust Co. of New York v. New Jersey, 431 US 1, 17 n. 13 (1977); Usery v. Turner Elkhorn Mining Co., 428 US 1, 16-17 (1976) ("It does not follow . . . that what Congress can legislate prospectively it can legislate retrospectively. The retrospective aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former."); Elliot v. Volpe, 328 F Supp 831 (D. Mass. 1971) (denying retroactive application of National Environmental Policy Act in order to avoid disruption of antecedent rights); Southwestern Petroleum Corp. v. Udall, 361 F2d 650, 654 (10th Cir. 1966) ("Except as rights are vested, the benefits of existing legislation may be superseded or be modified by later legislation."); Hochman, The Supreme Court and the Constitutionality of Retroactive Legislation, 73 Harv. L. Rev. 695 (1960); C. Sands, Sutherland on Statutory Construction §41.06 (statutes affecting vested rights) (4th ed. 1973).

Resolution of this issue turns on a number of sub-issues, namely, whether Multi-State had a legal right to have its application compared with that of RKO General and, if so, whether that right vested prior to enactment of Section 331. If Multi-State is deemed to have had a vested right, the next question is whether statutory divestiture of that right works "harsh and oppressive" consequences against it and, thus, violates due process of law. See id. See also Welch v. Henry, 305 US 134, 147 (1938).

disserves the people of New Jersey, who are the primary intended beneficiaries of this provision.

Section 331 empowers the Commission to grant a license "for a term *not to exceed* five years" (emphasis added). It is obvious that a license issued under this provision can carry a term of *less than* five years. Any other reading of this phrase would torture its plain meaning. Nor does the pertinent legislative history suggest that Congress intended an alternative construction.[6] Therefore, the Commission had the discretion to license RKO for a term shorter than five years and, we believe, for several reasons, licensing RKO for more than 18 months was ill-advised.

An 18-month term would have synchronized RKO's license term with the June 1, 1984 renewal cycle filing date applicable to all other licensees in this geographical area. Beyond this administrative housekeeping benefit, calling for RKO's renewal in 18 months would have let us assess whether RKO is truly serving New Jersey's particularized

[6]The only discussion relevant to the point is Senator Bradley's statement that the intended Section 331's predecessor, S. 1629, to serve as "an inducement to undertake the expense of moving studio facilities [by requiring] the FCC . . . renew [the] license for up to five years." 128 Cong. Rec. S3160 (March 31, 1982). This reasoning does not, contrary to RKO's suggestion in its September 15, 1982 letter, compel the issuance of a five-year grant. RKO has every inducement to move, given that its outright relicensing would extinguish Multi-State's long-pending comparative challenge. A shorter license term would not undercut this inducement; it would simply require RKO to file a renewal application sooner than the five year outer limit specified in Section 331. Aside from the obvious benefit of ridding RKO of a bothersome comparative proceeding, the relatively minor effort required of RKO to satisfy Section 331 further negates any argument that a five-year grant is necessary to "induce" RKO to serve New Jersey. To meet the bare terms of the statute, RKO need only lease main studio facilities across the New York border in northern New Jersey; that is precisely what it proposed. RKO plans to use the *identical* transmitters it now uses to serve New York, and will broadcast to the *identical* area it has served for many years as a New York licensee.

needs (despite the fact that its coverage area will remain completely unchanged), consistent with Congress' dominant purpose in enacting Section 331. Congress obviously intended a public interest quid pro quo for authorizing RKO's release from the pending comparative hearing. That quid pro quo is real service to the people of New Jersey, and it is the responsibility of this Commission to ensure that RKO complies with this condition.

Early examinaton of RKO's performance also would have helped the Commission to determine whether to continue the special New Jersey service obligations imposed on selected New York and Philadelphia licensees — a decision to be made in 1984[7] when these licensees' renewal applications will be filed and evaluated. These special service obligations stem from the finding that New Jersey's needs are not now being properly served. Without a record upon which to judge whether RKO is adequately satisfying those unmet needs, it is difficult to understand on what basis, other than sheer speculation, this agency will determine whether the situation that prompted the special service requirements has finally been remedied.

Awarding RKO an 18-month license would, in addition, have been in accord with the spirit of New South Media Corp. v. FCC,[8] where the Court of Appeals chastized the FCC for unreasonably insulating RKO General's many licenses from challenge by competing applications contrary to the Ashbacker doctrine. The majority here has again forestalled the competition so strongly endorsed in New South Media. Because an 18-month license grant

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[7]These obligations were imposed in the Second Report and Order, 59 FCC 2d 1386 (1976), aff'd, New Jersey Coalition for Fair Broadcasting v. FCC, 574 F2d 1119 (3rd Cir. 1978). See CBS, Inc., 52 RR 2d 353 (1982) (enforcing special service obligations.).

[8]____ F2d ____, No. 80-2556 (DC Cir., August 13, 1982).

would better accord with Section 331 and its legislative purpose, with the Commission's own administrative needs, and with recent judicial admonition, we are at a loss to understand the rationale for the majority's action.

We also dissent from the majority's refusal to override RKO's designation of Secaucus as its new community of license. As with the license term issue, we do not interpret Section 331 as denying the Commission discretion to select the allocation that would best serve New Jersey's needs. The statute mandates a grant upon receipt of any existing licensee's notification of its consent to move to a state without a commercial VHF station. An argument can be made that the language "that such licensee will agree to the reallocation of its channel to a community within a state" is intended to repose complete discretion in a licensee to select its new community of operation. Such construction, however, would substantially undermine the statutory intent that New Jersey's needs, not the licensee's, be optimally served. In this connection, the Conference Report states:

> "It is the intention of Congress that any current licensee which exercises the option of seeking the transfer of its license to an unserved State under the terms of this section will move its studio and offices to, and operate for the public benefit of the unserved State."[9]

Senator Bradley underscored that the fundamental purpose of Section 331 was to ensure that the contemplated New Jersey station "is responsive to the needs of my State. This station will not be a New Jersey station in name only. It will serve the people of New Jersey."[10]

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[9]S. Rep. No. 760, 97th Cong. 2d Sess. 690 (1982).

[10]128 Cong. Rec. S10946 (August 3, 1982).

We cannot accept the view that allocating Channel 9 to Secaucus, a town with approximately 13,000 residents, implements or accords with the will of Congress. The majority by circulation vote has added a sui generis condition requiring RKO to render primary service to its entire Grade B service area, not just Secaucus. However, based on the record compiled in response to the FCC's outstanding 1980 rule making proposal to reassign Channel 9 to northern New Jersey, Channel 9 should be reassigned to Newark, as our Mass Media Bureau originally recommended. Newark is New Jersey's largest city, and is said to be the largest major city in the country without a conventional television station. Under ordinary allocation principles,[11] reassignment to Newark would best achieve Congress' desire to provide adequate, effective service to the people of New Jersey. To ensure that WOR-TV will be responsive to all of northern New Jersey, not just to the needs of Newark, the Commission could have specified an enhanced Grade B contour service duty, as the majority has done in this Order with respect to the designation of the town of Secaucus as the community of license. This alternative would have better served the congressional purpose underlying Section 331 as well as established Section 307(b) allocation principles.

In conclusion, the constitutional challenge posed by Section 331 is considerable, as indicated at the outset. The majority has needlessly and unwisely magnified the challenge posed by Section 331 by granting RKO a full five-year license and by designating Secaucus as WOR-TV's new community of license in a manner that does not place sufficient emphasis on the needs of the residents of New Jersey. From the objectionable decisions detailed above, we dissent.

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[11]Sixth Report and Order, 41 FCC 148, 167 (1952) (Television Assignments).

RKO GENERAL, INC. (WOR-TV)

FCC 82-559
94940

In re Applications of	)	
	)	
RKO GENERAL, INC. (WOR-TV)	)	Docket No. 19991
New York, New York	)	File No. BRCT-71
	)	
For Renewal of Broadcast License	)	
	)	
MULTI-STATE COMMUNICATIONS,	)	Docket No. 19992
INC., New York, New York	)	File No. BPCT-4527
	)	
For Construction Permit for New	)	
Television Broadcast Station	)	

Adopted: December 8, 1982
Released: March 29, 1983

[¶10:331] *Dismissal of opposing application following reallocation.*

Following reallocation of VHF Channel 9 from New York City to Secaucus, N.J., and grant of the New York licensee's application to operate the channel from the New Jersey community (action mandated by Section 331 of the Act), a competing construction permit application and other pleadings filed in the renewal proceeding relating to the New York Station are dismissed as moot. RKO General, Inc. (WOR-TV), 53 RR 2d 671 [1983].

ORDER

By the Commission: (Commissioners Fogarty, Jones and Rivera concurring in the result.)

1. On April 10, 1974,[1] the above captioned matter was designated for hearing. At that time RKO was also engaged in a contest involving its license renewal application for Sation WNAC-TV, Boston, Massachusetts.[2] In light of questions arising in that proceeding, the Commission conditioned any possible grant of RKO's license renewal for Station WOR-TV on the outcome of the Boston proceeding.[3] Ultimately, the Commission concluded that RKO was unqualified to remain the licensee of Station WNAC-TV[4] and that this conclusion compelled a similar determinaton with respect to RKO's qualifications to remain the licensee of WOR-TV.[5] On appeal, the court affirmed the conclusion reached in the Boston proceeding but held that the narrow ground for disqualification did not automatically warrant RKO's disqualification as the licensee of WOR-TV.[6] It thus remanded the New York proceeding to the Commission with instructions to ascertain specifically the impact of the conclusions reached in the Boston proceeding on RKO's qualifications to remain a licensee of its New York station.

2. On August 19, 1982, before the Commission had an opportunity to consider the above question, the Congress

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[1]RKO General, Inc. (WOR-TV), 46 FCC 2d 246 [29 RR 2d 1444] (1974).

[2]RKO General, Inc. (WNAC-TV), Docket Nos. 18759-61 (Boston, Massachusetts). Questions of RKO's qualifications were first raised in a third proceeding involving RKO. See RKO General, Inc. (KHJ-TV), Los Angeles, California (Docket Nos. 16679 and 16680).

[3]RKO General, Inc. (WOR-TV), 69 FCC 2d 461 [43 RR 2d 1141] (1978).

[4]RKO General, Inc. (WNAC-TV), 78 FCC 2d 1 [47 RR2d 921] (1980).

[5]RKO General, Inc. (WOR-TV), 78 FCC 2d 357 (1980).

[6]RKO General, Inc. v. FCC, 670 F2d 215 [50 RR 2d 821], cert. denied, 102 S Ct 1978 (1982).

of the United States passed the Tax Equity and Fiscal Responsibility Act of 1982. Section 355 of that Act amends the Communications Act of 1934 and reads as follows:

> "Section 331. It shall be the policy of the Federal Communications Commission to allocate channels for very high frequency commercial television broadcasting in a manner which ensures that not less than one such channel shall be allocated to each State, if technically feasible. In any case in which licensee of a very high frequency commercial televsion broadcast station notifies the Commission to the effect that such licensee will agree to the reallocation of its channel to a community within a State in which there is allocated no very high frequency commercial television broadcast channel at the time of such notification, the Commission shall, notwithstanding any other provision of law, order such reallocation and issue a license to such licensee for that purpose pursuant to such notification for a term of not to exceed 5 years as provided in Section 307(d) of the Communications Act of 1934."

3. On September 6, 1982, after the bill was signed into law, RKO notified the Commission that it would agree to a reallocation of its license for Channel 9, WOR-TV, New York City, to a site in New Jersey, a State which currently has no operational very high frequency (VHF) commercial television broadcast station. In accordance with the Congressional mandate of Section 355 of the 1982 tax act the Commission has by separate action today ordered the reallocation of Channel 9, New York City, to Newark, New Jersey, and has issued RKO a license for that station for a term of five years [see 53 RR 2d 469. -Ed].

4. Consistent with that Order the present proceeding may therefore be terminated[7] and numerous pleadings pending in this proceeding will be dismissed as moot or otherwise disposed of as follows.

5. Accordingly, it is ordered, that the Petition for Leave to Amend filed September 26, 1979 by RKO General, Inc. is granted and the amendment is accepted.[8]

6. It is further ordered, that the Petition for Leave to Amend filed May 28, 1980 by RKO General, Inc. is granted and the amendment is accepted.[9]

7. It is further ordered, that the Petition for Reconsideration filed September 11, 1978 by Multi-State Communications, Inc. is dismissed as moot.

8. It is further ordered, that the Motion to Enlarge Issues filed August 25, 1980 by RKO General, is dismissed as moot.

9. It is further ordered, that the Petition for Leave to Amend filed January 8, 1980 by Multi-State Communications, Inc. is dismissed as moot.

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[7]Given the explicit legislative directive that a license be issued "notwithstanding any other provision of law," previous questions as to RKO's qualifications to be the licensee of WOR-TV, New York City, and as to the comparative qualifications of Multi-State are no longer relevant to the disposition of this proceeding.

[8]This unchallenged petition reported media related interests of RKO General, Inc. and good cause for its acceptance has been shown.

[9]This uncontested petition provided information on dismissal of certain litigation against General Tire & Rubber Co. and Frontier Airlines, Inc. Good cause for acceptance of this amendment has been demonstrated by RKO.

10. It is further ordered, that the Petition for Waiver of Rule filed February 7, 1980 by Multi-State Communications, Inc. is dismissed as moot.

11. It is further ordered, that the Petition for Leave to Amend filed June 9, 1980 by Multi-State Communications, Inc. is dismissed as moot.

12. It is further ordered, that the Petition for Leave to Amend filed January 12, 1981 by Multi-State Communications, Inc. is dismissed as moot.

13. It is further ordered, that the Petition for Intervention and Special Relief filed July 7, 1980 by the New Jersey Coalition for Fair Broadcasting is dismissed as moot.

14. It is further ordered, that the Petition for Leave to Intervene and Motion to Open Proceedings for New Applications, filed August 14, 1980 by Crossroads Communications is dismissed as moot.

15. It is further ordered, that the Motion to Dismiss Crossroad Communications' Unauthorized Reply to Oppositions to Petition for Leave to Intervene filed September 10, 1980 by the Broadcast Bureau is dismissed as moot.

16. It is further ordered, that the Opposition to Broadcast Bureau's Motion to Dismiss its Reply and Request for Leave to File its Reply filed September 19, 1980 by Crossroads Communications is dismissed as moot.

17. It is further ordered, that the Motion to Strike Comments of Senators Bill Bradley and Harrison A. Williams, Jr. filed July 9, 1980 by Multi-State Communications, Inc. is dismissed as moot.

18. It is further ordered, that the Petition to Hold in Abeyance filed March 22, 1979 by RKO General, Inc. is dismissed as moot.

19. It is further ordered, that the Motion to Expedite WOR-TV Remand Proceeding and Escrow WOR-TV Profits filed November 4, 1982 by Multi-State Communications, Inc. is dismissed as moot.

20. It is further ordered, that the application of Multi-State Communications, Inc. for a construction permit and the application of RKO General, Inc. for renewal of license of Station WOR-TV are dismissed as moot, consistent with our ruling this same date reallocating Channel 9 to a community in New Jersey.

21. It is further ordered, that this proceeding is terminated.

APPENDIX C

A. Order of the United States Court of Appeals
District of Columbia Circuit denying rehearing
May 7, 1984

B. Order of the United States Court of Appeals
District of Columbia Circuit denying suggestion
for rehearing *en banc*
May 7, 1984

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83-1296 September Term, 19

Multi-State Communications, Inc.,
Appellant

v.

Federal Communications Commission,
Appellee

RKO General, Inc.,
Intervenor

And Consolidated Case No. 83-1325

BEFORE: Wright and Tamm, Circuit Judges, and Swygert*, Senior Circuit Judge, United States Court of Appeals for the Seventh Circuit

ORDER

On consideration of Appellant's Petition for Rehearing, filed April 20, 1984, it is

ORDERED by the Court that the aforesaid Petition for Rehearing is denied.

Per Curiam

For the Court:

GEORGE A. FISHER, Clerk

BY: /s/ Robert A. Bonner
Robert A. Bonner
Chief Deputy Clerk

United States Court of Appeals
for the District of Columbia Circuit
Filed May 7, 1984
GEORGE A. FISHER
Clerk

*Sitting by designation pursuant to Title 28 U.S.C. §294(d).

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83-1296 September Term, 19

Multi-State Communications, Inc.,
Appellant

v.

Federal Communications Commission,
Appellee

RKO General, Inc.,
Intervenor

And Consolidated Case No. 83-1325

BEFORE: Robinson, Chief Judge; Wright, Tamm, Wilkey, Wald, Mikva, Edwards, Ginsburg, Bork, Scalia and Starr, Circuit Judges, and Swygert*, Senior Circuit Judge, United States Court of Appeals for the Seventh Circuit

ORDER

The Suggestion for Rehearing *en banc* of Appellant, filed April 20, 1984, has been circulated to the full Court and no member has requested the taking of a vote thereon. On consideration of the foregoing, it is

ORDERED by the Court *en banc* that the aforesaid suggestion is denied.

Per Curiam

For the Court:

GEORGE A. FISHER, Clerk

BY: /s/ Robert A. Bonner
Robert A. Bonner
Chief Deputy Clerk

*Sitting by designation pursuant to Title 28 U.S.C. §294(d).

United States Court of Appeals
for the District of Columbia Circuit
Filed May 7, 1984
GEORGE A. FISHER
Clerk

APPENDIX D

A. 47 U.S.C. Section 331 (1982)

B. CURRENT TABLE OF ASSIGNMENTS OF VHF TELEVISION CHANNELS IN NEW YORK AND NEW JERSEY
(Section 73.606, FCC Rules and Regulations)

TEXT OF NEW SECTION 331 OF THE COMMUNICATIONS ACT OF 1934 AS AMENDED

47 U.S.C. §331

"It shall be the policy of the Federal Communications Commission to allocate channels for very high frequency commercial television broadcasting in a manner which ensures that not less than one such channel shall be allocated to each State, if technically feasible. In any case in which a licensee of a very high frequency commercial television broadcast station notifies the Commission to the effect that such licensee will agree to the reallocation of its channel to a community within a State in which there is allocated no very high fequency commercial television broadcast channel at the time of such notification, the Commission shall, notwithstanding any other provision of law, order such reallocation and issue a license to such licensee for that purpose pursuant to such notification for a term of not to exceed 5 years as provided in Section 307(d) of the Communications Act of 1934."

	Channel No.
Montana:	
Anaconda	2+
Billings	2, 8, *11, 14, 20+
Bozeman	*9
Butte	4, 6+, *7−, 18, 24
Cut Bank	*14−
Dillon	*14+
Glendrive	5+, 9+, *16−
Great Falls	3+, 5+, 16, 26, *32
Hardin	4+
Havre	9+, 11+, *18−
Helena	10+, 12, *15+
Kalispell	9−, *29−
Lewistown	13
Miles City	3−, *6, 10
Missoula	8−, *11−, 13−, 17−, 23−
Wolf Point	*17+
Nebraska:	
Albion	8+, *21+
Alliance	*13−
Bassett	*7−
Grand Island	11−, 17−
Hastings	5−, *29+
Hayes Center	6
Hay Springs	4+
Kearney	13
Lexington	*3+
Lincoln	10+, *12−, 45, 51
McCook	8−
Merriman	*12
Norfolk	*19+
North Platte	2−, *9+
Omaha	3, 6+, 7, 15, *26, 42+, *48−

Scottsbluff ..... 10—
Superior ..... 4+

Nevada:

Boulder City ..... 5+
Elko ..... 10—, *14+
Ely ..... 3—, 6+
Fallon *25
Goldfield ..... 2—
Las Vegas ..... 3, 8—, *10+, 13—, 21+
McGill *13
Reno ..... 2, 4, *5, 8, 21+, 27+
Tonopah ..... 9—, *17+
Winnemucca ..... 7+, *15—
Yerington ..... *16+

New Hampshire:

Berlin ..... *40—
Concord ..... 21+
Durham *11
Hanover ..... *15+, 31
Keene ..... *52+
Littleton ..... *49+
Manchester ..... 9—, 50—, 60+
Portsmouth ..... [1]17—

New Jersey:

Asbury Park ..... [5]58
Atlantic City ..... *18, *36, 53+
Burlington ..... 48—
Camden ..... *23+
Little Falls ..... *50+
Newark ..... 13—, 68
New Brunswick ..... *19—[1], 47+, *58
Paterson ..... 41—
Trenton ..... *52—
Vineland ..... 65—
Wildwood 40

New Mexico:
Alamogordo *18–
Albuquerque .. 4+, *5+, 7+, 13+, 14–, 23–, *32+
Carlsbad ..... 6–, *15+, 25–
Clayton *17
Clovis ..... 12+
Deming *16
Farmington ..... 12+, *15+
Gallup 3, *8–, 10
Hatch *12
Hobbs ..... 29+
Las Cruces ..... *22–, 48+
Lovington *19
Portales ..... *3+
Raton *18–
Roswell ..... 8, 10–, 21–, 27–, *33+
Santa Fe ..... 2+, *9+, 11–, 19–
Silver City ..... 6, *10+
Socorro *15–
Tucumcari *15

New York:
Albany-Schenectady ..... 6, 10–, 13, *17+, 23–, *29+, 45
Amsterdam ..... *39+, 55
Binghamton ..... 12–, 34, 40–, *46+
Buffalo ..... 2, 4–, 7+, 17, *23, 29–, 49–
Carthage 7–
Corning *30
Elmira ..... 18+, 36–
Glens Falls *58–
Ithaca ..... 52, *65+
Jamestown ..... 26+, *46
Kingston 63
Lake Placid ..... 5, *34+
Levittown *21–
Massena *18

New York ..... 2, 4, 5+, 7, 9+, 11+, *25, 31–
Oneonta ..... 15,[1] *42
Patchogue 67
Plattsburg *57
Poughkeepsie ..... 54+
Riverhead ..... 55+
Rochester ..... 8, 10+, 13–, *21, 31+, *61+
Syracuse ..... 3–, 5–, 9–, *24+, 43+, 62+
Utica ..... 2–, 20+, 33, *59
Watertown ..... *16, 50+

North Carolina:

Asheville ..... 13–, 21+, *33, 62+
Burlington 16
Chapel Hill ..... *4+
Charlotte ..... 3, 9+, 18, 36, *42+
Columbia *2
Concord *58
Durham ..... 11+, 28+
Fayetteville ..... 40+, 62
Franklin ..... *56+
Goldsboro 17–
Greensboro 2–, 48–, 61
Greenville 9–, 14, *25
Hickory 14–
High Point ..... 8–, *32+
Jacksonville 19
Kannapolis 64–
Lexington 20
Linville *17
Morganton 23–
New Bern ..... 12+
Raleigh 5, 22, *34–
Rocky Mount 47–
Washington 7
Waynesville 59
Wilmington ..... 3–, 6, 29+, *39–

Wilson ..... 30−
Winston-Salem ..... 12, *26+, 45

North Dakota:

Bismarck ..... *3, 5, 12−, 17−, 26+
Devils Lake ..... 8+, *22+
Dickinson ..... 2+, *4−, 7
Ellendale ..... *19−
Fargo ..... 6, 11+, *13, 15−
Grand Forks ..... *2, 14+, 27+
Jamestown ..... 7−, *23
Minot ..... *6+, 10−, 13−, 14−, 24
Pembina 12

[1] Following the decision in Docket No. 18261, channels so indicated will not be available for television use until further action by the Commission.

Channels reserved for non-commercial use are indicated by an asterisk. [5] This channel is not available for use at Ashbury Park unless and until it is determined by the Commission that it is not needed for educational use at New Brunswick, N.J.